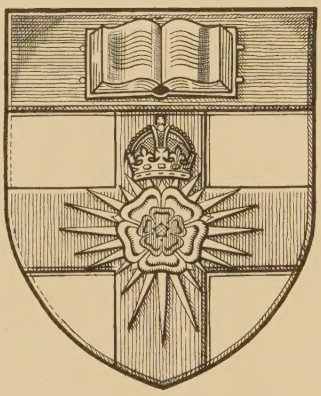
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY
REFERENCE ONLY
346.4 Mx. North Gallery



UNIVERSITY OF LONDON
LIBRARY

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—JOSEPH BROWN, Esq., Q.C.

EX-OFFICIO MEMBERS.

SIR JOHN HOLKER, Knt., M.P. . .	ATTORNEY GENERAL.
SIR HARDINGE S. GIFFARD, Knt. . .	SOLICITOR GENE[illegible]

ELECTED MEMBERS.

MR. SERJEANT SIMON, M.P. MR. SERJEANT PULLING	Serjeants' Inn.
W. B. GLASSE, ESQ., Q.C. JOHN PEARSON, Esq., Q.C.	Lincoln's Inn.
WILLIAM FORSYTH, Esq., M.P., Q.C. JAMES FITZJAMES STEPHEN, Esq., Q.C.	Inner Temple.
JOSEPH BROWN, Esq., Q.C. ALFRED WILLS, Esq., Q.C.	Middle Temple.
JOHN A. RUSSELL, Esq., Q.C. WILLIAM CRACROFT FOOKS, Esq., Q.C.	Gray's Inn.
WILLIAM WILLIAMS, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields W. S. COOKSON, Esq. (Firm—Messrs. Cookson, Wainewright, & Pennington), 6, New Square, Lincoln's Inn	Incorporated Law Society.

Secretary—JAMES THOMAS HOPWOOD, Esq., 10, Old Square, Lincoln's Inn.

THE

LAW REPORTS.

Probate Division.

IN THE COURTS OF PROBATE AND DIVORCE

REPORTED BY

RICHARD SEARLE, BARRISTER-AT-LAW,

AND

JOHN G. MIDDLETON, LL.D., ADVOCATE;

IN THE ADMIRALTY AND ECCLESIASTICAL COURTS

BY

GAINSFORD BRUCE, BARRISTER-AT-LAW;

AND

IN THE PRIVY COUNCIL

BY

HERBERT COWELL, BARRISTER-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. I.

FROM MICHAELMAS SITTINGS, 1875, TO TRINITY SITTINGS, 1876,

BOTH INCLUSIVE.

XXXIX VICTORIA.

LONDON:

Printed for the Incorporated Council of Law Reporting for England and Wales

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.

PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1876.

BIBL. LONDIN UNIV.

BIBL.
LONDIN.
UNIV.

JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

XXXIX VICTORIA.

The Right Hon. Sir JAMES HANNEN, Knt., President.

Sir ROBERT PHILLIMORE, Knt., D.C.L.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Anna, The	(C. A.)	253
Astor, In the Goods of		150

B.

Baigent *v.* Baigent		421
Bangham, In the Goods of		429
Beddington *v.* Beddington		426
Benyon *v.* Benyon		447
Bonelli, In the Goods of		69
Braddock, In the Goods of		433
Brooklyn, The City of	(C. A.)	276
Burdett, In the Goods of		427

C.

Cargo ex Woosung	(C. A.)	260
Cartwright, Mary, In the Goods of		422
Catterina Chiazzare, The		368
Clifton *v.* Ridsdale		316
———, Ridsdale *v.*	(P. C.)	383
Cole, Wyndham *v.*		130
Cook, Jenkins *v.*	(P. C.)	80
Crisp *v.* Martin		302

D.

		PAGE
Dalhousie, The		271
Delta, The		393
Dracachis, Nicholas		72
Durst *v.* Masters		123
——— *v.* ———	(P. C.)	373

E.

Erminia Foscolo, The		393

F.

Farrands, In the Goods of		439

G.

Gally, In the Goods of		438
Gladstone *v.* Gladstone		442
Glannibanta, The	(C. A.)	283
Grant, In the Goods of		435

H.

Hawks *v.* Hawks		137
Hudson *v.* Hudson		65

J.

		PAGE
James *v.* Shrimpton		431
Jenkins *v.* Cook	(P. C.)	80
Juno, The		135

Keet *v.* Smith	(P. C.)	73
Kennaway *v.* Kennaway		148

L.

Le Sueur *v.* Le Sueur		139
Limerick, The		292
———	(C. A.)	411

M.

Machon, Phillimore *v.*		481
Martin, Crisp *v.*		302
Masters, Durst *v.*		123
———, ——— *v.*	(P. C.)	373
Medina, The		272
Moxham, The		43
———	(C. A.)	107

N.

Nicholas *v.* Dracachis		72

O.

Ousey *v.* Ousey		56

P.

Parana, The		452
Pearn, In the Goods of		70
Peter der Grosse, The		414
Phillimore *v.* Machon		481
Polymede, The		121

R.

R., W. *v.*		405
Ridsdale, Clifton *v.*		316
——— *v.* Clifton	(P. C.)	383

S.

Schiller, The Cargo ex		473
Schwerdtfeger, In the Goods of		424
Sheehy, In the Matter of		423
Shrimpton, James *v.*		431
Sisters, The	(C. A.)	117
———		281
Smith, Keet *v.*	(P. C.)	73
———, Re		300
Star of India, The		466
St. George-in-the-East, Re		311
St. Leonards, Lord, Sugden *v.*	(C. A.)	154
Sugden *v.* Lord St. Leonards	(C. A.)	154

T.

Two Brothers, The		52

V.

Victoria, The	(C. A.)	280

W.

W. *v.* R.		405
Woosung, Cargo ex	(C. A.)	260
Wyndham *v.* Cole		130

TABLE OF CASES CITED.

A.

		PAGE
A *v.* B.	Law Rep. 1 P. & M. 559	405
Alice, The	Law Rep. 2 P. C. 245	287
Anglo-Indian, The	33 L. T. (N.S) 233; 3 Asp. Mar. L. C. 1	277, 278
Anon.	2 Sw. & Tr. 249	68

B.

B. *v.* B.	1 Adm. & Eccl. 248, 261	405, 408
Barry *v.* Barclay	15 C. B. (N.S.) 849	116
Barton *v.* Wells	1 Hagg. Cons. 21	93
Bettison, Re	Law Rep. 4 A. & E. 294	312
Bond *v.* Bond	2 Sw. & Tr. 93	143
Borries *v.* Hutchinson	18 C. B. (N.S.) 445	461
Boulton *v.* Boulton	3 Sw. & Tr. 405	58, 67
Boyd *v.* Phillpots	Law Rep. 4 A. & E. 297, 313	93, 326, 328, 377
Breeks *v.* Woolfrey	1 Curt. 880	74
Briggs *v.* Morgan	2 Hagg. Cons. 329	409
Bristow *v.* Sequeville	5 Ex. 275	69
British Columbia Saw Co. *v.* Nettleship	Law Rep. 3 C. P. 499	462
Brodie *v.* Brodie	2 Sw. & Tr. 259	144
Brown *v.* Brown	8 E. & B. 876	154, 173, 176, 177, 215, 220, 259
Bullock *v.* Caird	Law Rep. 10 Q. B. 276	108
Burch *v.* Reid	Law Rep. 4 A. & E. 112	302, 303, 304, 305
Burder *v.* Heath	3 Curt. 822	484, 485
——— *v.* O'Neill	9 Jurist (N.S.), 1109	484
Burgoyne *v.* Free	2 Bli. (N.S.) 65	484, 485
Burls *v.* Burls	Law Rep. 1 P. & M. 472	175
Butt *v.* Jones	2 Hagg. Eccl. 417, 424	74, 314

C.

Cairo, The	Law Rep. 4 A. & E. 184	475
Callwell *v.* Callwell	3 Sw. & Tr. 259	143, 449
Campbell *v.* Spotiswoode	3 B. & S. 769	335
Capua, Prince of, *v.* Ludolf	Annual Register, 1836, p. 60	485
Cargo ex Woosung, The	1 P. D. 260	275
Casmore, In the Goods of	Law Rep. 1 P. & M. 653	71
Castleden *v.* Castleden	9 H. L. C. at p. 191	409

		PAGE
Catterina Chiazzare	1 P. D. 368	404
Chamney, In the Goods of	1 Rob. Eccl. 757	434
Chetwynd *v.* Chetwynd	Law Rep. 1 P. & M. 39	444, 445
Clark, The, Ella, A.	Br. & L. Adm. 32	255, 259
Clarkington, In the Goods of	2 Sw. & Tr. 380	425
Clifton *v.* Ridsdale	1 P. D. 364	385
Coles, In the Goods of	3 Sw. & Tr. 181	428
Collard *v.* South Eastern Railway Company	7 H. & N. 79	458, 461
Cope *v.* Doherty	2 De G. & J. 614	108
Copin *v.* Adamson	Law Rep. 9 Ex. 345; 1 Ex. D. 17	401
Cooper, In the Goods of	Deane, Eccl. 9	430
Cory *v.* Thames Iron and Shipbuilding Company	Law Rep. 3 Q. B. 181	462
Craddock *v.* Craddock	29 L. J. (P. M. & A.) 55	67
Cutto *v.* Gilbert	9 Moo. P. C. 131	174

D.

Dalhousie, The	1 P. D. 271, n.	268
Dalrymple *v.* Dalrymple	2 Hagg. Cons. at p. 59	48
Davies, In the Goods of	2 Hagg. Eccl. 79	436
Davis, In the Goods of	3 Curt. 748	434
Davis *v.* Davis	2 Add. 223	175
—— *v.* Garrett	6 Bing. 716	468
Deck *v.* Deck	2 Sw. & Tr. 90	142, 144
Delegal *v.* Highley	3 Bing. N. C. 950	329
Dering *v.* Dering	Law Rep. 1 P. & M. 531	67
Dickinson *v.* Stidolph	11 C. B. (N.S.) 341	248
Dobree *v.* Napier	2 Bing. N. C. 781	48, 50
Doe *v.* Hiscocks	5 M. & W. 363	227
—— *d.* Shalcross *v.* Palmer	16 Q. B. 747	174, 215, 216, 225, 226, 227, 228, 229, 251
Dolphin *v.* Robins	7 H. L., at pp. 416, 419	141
Don *v.* Lippman	5 Cl. & F. 1	48, 400
Doulson *v.* Matthews	4 T. R. 503	45
Dundas, In the Goods of	32 L. J. (P. M. & A.) 165	152
Durst *v.* Masters	1 P. D. 123	373

E.

Earl Spencer, The	32 L. T. (N.S.) 235; 3 Esp. Mar. L. C. 4	277, 278
Elphinstone *v.* Purchas	Law Rep. 3 A. & E. 66, 105, 107	126, 133, 327, 330, 335, 376
Enchantress, The	Lush. Adm. 93	274
Escott *v.* Mostin	4 Moo. P. C. 104	92
Exchange, The, *v.* McFadden	7 Cranch, R. 116	108

F.

Fell *v.* Bond	1 Robert. 740	304
Fendall *v.* Wilson	2 Moo. P. C. (N.S.) 375	83, 84, 88
Fenwick, John, The	Law Rep. 3 A. & E. 500	278
Fernie *v.* Young	Law Rep. 1 H. L. 63	209, 210, 211, 212

		PAGE
Finch *v.* Finch	Law Rep. 1 P. & M. 371	175
Fisher *v.* Fisher	2 Sw. & Tr. 410	444, 445
Forster *v.* Forster	3 Sw. & Tr. 151	67, 144
Foster *v.* Foster	1 Add. 462	175
France *v.* Gaudet	Law Rep. 6 Q. B. 199	468, 472
Fraser *v.* Telegraph Construction and Maintenance Company	Law Rep. 7 Q. B. 566	455, 458
Fusilier, The	Br. & L. 341	475, 480

G.

G. *v.* T.	3 Sw. & Tr. 312	405
Gardner, In the Goods of	1 Sw. & Tr. 109	175
General Steam Company *v.* Guillou	11 M. & W. 877, 895	49, 108, 113, 401
Grant *v.* Grant	2 Sw. & Tr. 522	137
Gray *v.* Gray	2 Sw. & Tr. 554	67
Great Western Railway Company *v.* Redmayne	Law Rep. 1 C. P. 329	461
Guest *v.* Guest	2 Hagg. Cons. 323	409

H.

H. *v.* C.	1 Sw. & Tr. 605; on appeal, 9 H. L. C. 186	405
Hadley *v.* Baxendale	9 Ex. 341	458, 459, 460
Halley, The	Law Rep. 2 A. & E. 3; Law Rep. 2 P. C. 193	46, 47, 51, 108, 111, 114, 115, 471
Harding *v.* Harding	34 L. J. (P. M. & A.) 9	68
Harper *v.* Forbes	5 Jur. (N.S.) 275	74
Hawke *v.* Wedderburn	Law Rep. 1 P. & M. 594	440
Hebbert v. Purchas	Law Rep. 3 P. C. 605, 652	323, 335, 342, 343, 376
Helene, The	Br. & L. Adm. 425	280
Helen and George, The	Sw. Adm. 368	266, 270
Herbert *v.* Herbert	2 Phillim. Eccl. 430	385, 388
Hibernia, The	4 Jur. (N.S.) 1244	119
Hill *v.* Wilson	Law Rep. 8 Ch. 888	215
Hoey *v.* Felton	11 C. B. (N.S.) 142	469
Horne *v.* Midland Railway Company	Law Rep. 8 P. C. 131, 137	460, 463, 465
Howden, Lord, In the Goods of	43 L. J. (P. & M.) 26	152
Huckvale, In the Goods of	Law Rep. 1 P. & M. 375	71
Hulse *v.* Hulse	Law Rep. 2 P. & M. 259	59, 62
Hutchins *v.* Denziloe	1 Hagg. Cons. 170	133
Hyde *v.* Hyde	Law Rep. 1 P. & M. 130	48

I.

Ida, The	Law Rep. 3 A. & E. 542	297, 298
———	2 Asp. Mar. Cas. 551	416
Inca, The	Sw. Adm. 370	266, 270
India, The	33 L. J. (P. M. & A.) 185	254, 259
Industrie, The	Law Rep. 3 A. & E. 303	49, 119
Iona, The	Law Rep. 1 P. C. 426	283

J.

		PAGE
Jackson *v.* Union Marine Insurance Co.	Law Rep. 8 C. P. 572; Law Rep. 10 C. P. 125	462
Jebsen *v.* East & West India Dock Co.	Law Rep. 10 C. P. 300	468
Jenkins *v.* Cook	Law Rep. 4 A. & E. p. 463	81
Jessel *v.* Bath	Law Rep. 2 Ex. 267	416
Johannes, The	Lush. 182	475
John Fenwick, The	Law Rep. 3 A. & E. 500	278
Johnson *v.* Lyford	Law Rep. 1 P. & M. 546	217
Josling *v.* Irvine	6 H. & N. 512	457, 460
Julia, The	14 Moo. P. C. 210	287

K.

Karnak, The	Law Rep. 2 A. & E. 289; Law Rep. 2 P. C. 505	299
Keen *v.* Keen	Law Rep. 3 P. & M. 105	175, 217
Keet *v.* Smith	Law Rep. 4 A. & E. 398	74
Knight *v.* Cook	1 Lee, 413	175

L.

L. *v.* H.	4 Sw. & Tr. 115; Reported as X. *v.* Y.	405
Lanarkshire, The	2 Spinks, 189	370
Lansdowne, Marquis of, In the Goods of	3 Sw. & Tr. 194	152
Langmead *v.* Maple	18 C. B. (N.S.) 255, 270	400
Latham *v.* Latham	2 Sw. & Tr. 299	58, 59, 60, 61
Latour *v.* Latour	2 Sw. & Tr. 144	67, 68
Lee *v.* Fagg	Law Rep. 6 P. C. 38	321
Leroux v. Brown	12 C. B. 801	48
Lewis *v.* Lewis	2 Sw. & Tr. 394	58, 59, 63
Liddell *v.* Beal	14 Moo. P. C. 1, 9, 13	125, 129, 130, 373, 375, 376, 378, 382
——— *v.* Westerton	Moore's Special Report, 156	127, 128, 130, 340, 341, 373, 378
Lloyd *v.* Guibert	6 B. & S. 60; Law Rep. 1 Q. B. 115,	47, 48, 49, 51, 108
Lolley's Case	Russ. & Ry. 236	145
London, Mayor of, *v.* Cox	Law Rep. 2 H. L. 239	484
Lucy, The	3 Rob. 208	462

M.

M. *v.* B.	3 Sw. & Tr. 550	405
M. *v.* C.	Law Rep. 2 P. & M. 414; on appeal, Law Rep. 2 H. L., Sc. 300	405, 410
Maidman *v.* Malpas	1 Hagg. Cons. 205	74
Mali Ivo, The	Law Rep. 2 A. & E. 356	370, 400, 404
Manning *v.* Manning	Law Rep. 2 P. & M. 223	144
March *v.* March	Law Rep. 1 P. & M. 440	449
Martin *v.* Mackonochie	Law Rep. 2 A. & E. 116, 191, 209; Law Rep. 4 A. & E. 279; Law Rep. 2 P. C. 365; Law Rep. 3 P. C. 409	90, 323, 325, 334, 341, 342, 343, 375, 376

		PAGE
Martin *v.* Laking	1 Hagg. Eccl. 244	175
Masters *v.* Masters	34 L. J. (P. M. & A.) 7	68
Medwin, Ex parte	1 E. & B. 609	74
Merle, The	2 Asp. Mar. Law Cas. 402	45
Messina *v.* Petrococchino	Law Rep. 4 P. C. 144.	46
Meyer *v.* Ralli	1 C. P. D. 358	404
Middleton *v.* Crofts	2 Atk. 650, 669	92
Montefiore *v.* Montefiore	2 Ad. 354	214
Mordaunt *v.* Mordaunt	Law Rep. 2 P. & M. 382	57, 58
Mostyn *v.* Fabrigas	1 Cowp. 161; 1 Sm. L. C. 658, 7th ed.	45, 48, 108
Mycock *v.* Mycock	Law Rep. 2 P. & M. 98	58

N.

Narracott *v.* Narracott	4 Sw. & Tr. 76	445
Norwich, Bishop of, *v.* Pearse	Law Rep. 2 A. & E. 281	484

O.

Ocean, The	2 W. Rob. 368	254, 259
O'Hanlan v. Great Western Railway Co.	6 B. & S. 484.	461
Olivia, The	Lush. Adm. 497	278
Onni, The	Lush. Adm. 154	253, 256, 257
Orient, The	Law Rep. 3 P. C. 696.	370
Ousey *v.* Ousey	Law Rep. 3 P. & M. 223	57

P.

Parana, The	1 P. D. 452	469
Parnell *v.* Roughton	Law Rep. 6 P. C. 46, 51	324, 325, 331, 335
Patten *v.* Poulton	1 Sw. & Tr. 55	174, 175
Pearse, In the Goods of	Law Rep. 1 P. & M. 382	434
Perla, The	Sw. Adm. 353	256
Phillips *v.* Eyre	Law Rep. 6 Q. B. 1	48, 49, 50, 108, 111, 112, 115
Phillpotts *v.* Boyd	Law Rep. 6 P. C. 435, 466	325, 326, 329, 330, 332, 333, 336, 350, 351, 354, 356, 358, 377
Pierson *v.* Gell	Return of Causes before the Delegates, p. 85, No. 171	333
Pollard *v.* Wybourn	1 Hagg. Eccl. 725	405
Polymede, The	Law Rep. 3 A. & E. 612	121
Poole *v.* Bishop of London	14 Moo. P. C. 262	385
Priestley *v.* Lamb	6 Ves. 421	325
Prole *v.* Soady	Law Rep. 3 Ch. 220	58

Q.

Quick *v.* Quick	3 Sw. & Tr. 442	154, 174, 215, 216, 228, 229, 243, 250, 252

R.

		PAGE
Reg. *v.* Anderson	Law Rep. 1 Cr. C. 161	46, 47, 48, 49, 51, 109, 114
—— *v.* Chapman	2 Car. & K. 846	483, 488
—— *v.* Hodgkiss	Law Rep. 1 Cr. C. 212	483
—— *v.* Lesly	Bell's Cr. C. 220	49
—— *v.* Tomlinson	Law Rep. 1 Cr. C. 49	483
—— *v.* Twiss	Law Rep. 4 Q. B. 407	312, 314
Rex *v.* Forster	R. & R. 459	483
—— *v.* Verelst	3 Camp. 432	483
Ripley, In the Goods of	1 Sw. & Tr. 68	227
Ritchings *v.* Cordingley	Law Rep. 3 A. & E. 113	133
Roberts *v.* Phillips	4 E. & B. 450	434
Royal Charter, The	Law Rep. 2 A. & E. 362	136
Rowley *v.* London and North Western Railway Company	Law Rep. 8 Ex. 221	468
Ruddy, In the Goods of	Law Rep. 2 P. & M. 330	436

S.

Saxonia, The	Lush. Adm. 410	278
Schibsby *v.* Westenholz	Law Rep. 6 Q. B. 155	401
Scott *v.* Seymour	1 H. & C. 219	46, 108
—— *v.* Waithman	3 Stark. 168	330
Sharpe *v.* Hansard	3 Hagg. Eccl. 337	74
Shaw *v.* Attorney General	Law Rep. 2 P. & M. 156	144
—— *v.* Gould	Law Rep. 3 H. L. 55	145
Sheppard *v.* Bennett	Law Rep. 2 P. C. 450	386
Sibthorp, In the Goods of	Law Rep. 1 P. & M. 106	152
Sidney *v.* Sidney	36 L. J. (P. & M.) 73	61
Simonin *v.* Mallac	2 Sw. & Tr. 67	143
Simpson *v.* London and North Western Railway Company	1 Q. B. D. 274	463
Singapore, The	Law Rep. 1 P. C. 378	119
Sisters, The	1 P. D. 117, 281	282
Smeed *v.* Foord	1 E. & E. 602	458, 459, 460
Spencer, Earl, The	33 L. T. (N.S.) 235; 3 Asp. Mar. L. C. 4	277, 278
Staines *v.* Stewart	2 Sw. & Tr. 320	215
St. Cloud, The	Br. & L. 4	457
St. David's, Bishop of, *v.* Lucy	1 Ld. Raym. 447, 451	483, 484
Stephenson *v.* Higginson	3 H. L. C. 638	305
Stewart, In the Goods of	Law Rep. 1 P. & M. 727	425
Stoate *v.* Stoate	2 Sw. & Tr. 384	58, 59, 60
Stork, The	Not reported	370
Sumner *v.* Wix	Law Rep. 3 A. & E. 58, 66	133
Sykes, In the Goods of	Law Rep. 3 P. & M. 26	217

T.

Tarleton *v.* Tarleton	4 M. & S. 20	401
Theodore, The	Sw. Adm. 351, 352	263, 274
Tollemache *v.* Tollemache	1 Sw. & Tr. 557	143
Toller, Re	L. T. Jany. 1, 1876, pp. 159, 161	303, 309
Tommey *v.* White	6 Cl. & F. 786	209
Trevelyan *v.* Trevelyan	1 Phillim. 149	175

		PAGE
Trinity House *v.* Romney Marsh	Law Rep. 5 Ex. 204; Law Rep. 7 Ex. 247	119
Two Ellens, The	Law Rep. 4 P. C. 161	256

U.

Uhla, The	Law Rep. 2 A. & E. 29, n.	45

V.

Vallance *v.* Vallance	1 Hagg. Eccl. 693	175
Vallee *v.* Dumergue	4 Ex. 290	401
Velocity, The	Law Rep. 3 P. C. 44	370
Venus, The	1 Pritch. Ad. Dig. 129	119
Vicar *v.* Wilcocks	Sm. L. C. vol. ii. 534, ed. 1876	462
Vivian *v.* Vivian	Law Rep. 2 P. & M. 100	67
Volant, The	1 W. Rob. 383	297

W.

Walford *v.* Walford	Law Rep. 3 Ch. 812	364
Walker *v.* Goe	3 H. & N. 395; 4 H. & N. 350	469
———, In the Goods of	2 Sw. & Tr. 354	71
Walsh *v.* Bishop of Lincoln	Law Rep. 4 A. & E. 242	370, 372
Walter *v.* Montague	1 Curt. 253, 261	314
Ward *v.* New York Central Railway Company	47 N. Y. 29	464
Warrender *v.* Warrender	2 Cl. & F. 546	146, 147
Wataga, The	Sw. Adm. 165	253, 254, 255, 258, 259
Waverley, The	Law Rep. 3 A. & E. 369	274, 275
Wells *v.* Wells	3 Sw. & Tr. 542	59
Welsh *v.* Phillips	1 Moo. P. C. 299	173
Westerton *v.* Liddell	Moore's Special Rep. 107, 108, 164, 175	125, 126, 129, 325, 330, 332, 335, 343, 348, 350, 358, 373, 375, 376
Wharram *v.* Wharram	3 Sw. & Tr. 301	174, 176, 238, 239
Willem III., The	Law Rep. 3 A. & E. 487	475
Williams *v.* Dormer	2 Rob. Eccl. 505	141
Wilson *v.* Fendall	2 Moo. P. C. (N.S.) 375	83, 84, 88
———, In the Goods of	Law Rep. 1 P. & M. 269	434
——— *v.* Lancashire and Yorkshire Railway Company	9 C. B. (N.S) 632	461
——— *v.* M'Math	3 Phillim. 67	133
——— *v.* Wilson	Law Rep. 2 P. & M. 435	145
Wood *v.* Wood	2 Curt. 516	484
Woosung, Cargo Ex.	1 P. D. 260	275
Wynn *v.* Davies	1 Curteis Rep. 69, 83	325

Y.

Yelverton *v.* Yelverton	1 Sw. & Tr. 574	143

PUBLIC WORSHIP REGULATION ACT, 1874.

COPY OF ORDER IN COUNCIL approving RULES and ORDERS for settling PROCEDURE and FEES under "THE PUBLIC WORSHIP REGULATION ACT, 1874," dated the 28th June, 1875.

C. L. PEEL.

Council Office, July, 1875.

ORDER IN COUNCIL.

At the Court at *Windsor*, the 28th day of *June*, 1875.

PRESENT:

The QUEEN'S most Excellent Majesty in Council.

WHEREAS by an Act passed in the last session of Parliament, intituled, "An Act for the better administration of the Laws respecting the regulation of Public Worship," it is enacted that Her Majesty may, by Order in Council, at any time either before or after the commencement of the said Act, by and with the advice of the Lord High Chancellor, the Lord Chief Justice of England, the Judge to be appointed under the said Act, and the Archbishops and Bishops who are members of Her Majesty's Privy Council, or any two of the said persons, one of them being the Lord High Chancellor or the Lord Chief Justice of England, cause Rules and Orders to be made for regulating the procedure and settling the

6 Q B D 38
38 G 41
428,
6 App Cas
661

Port 322.

fees to be taken in proceedings under the said Act, so far as the same may not be expressly regulated by the said Act; And whereas the Right Honourable James Plaisted, Baron Penzance, has been duly appointed Judge under the said Act: Now, therefore, Her Majesty, in pursuance of the said Act, and by and with the advice of Her Privy Council, and of the Right Honourable Hugh McCalmont, Baron Cairns, the Lord High Chancellor, the Right Honourable Sir Alexander James Edmund Cockburn, Baronet, the Lord Chief Justice of England, the said Right Honourable James Plaisted, Baron Penzance, the Right Honourable and Most Reverend Archibald Campbell, Lord Archbishop of Canterbury, the Right Honourable and Most Reverend William, Lord Archbishop of York, and the Right Honourable and Right Reverend John, Lord Bishop of London, is pleased to make and issue the Rules and Orders hereunto annexed for regulating the said procedure, and to make and ordain the annexed Table of Fees to be taken in proceedings under the said Act.

C. L. Peel.

Rules and Orders made under the Provisions of the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), referred to in the foregoing Order.

I.

Representations, &c.

The representation, declarations, and all other documents required by the Act or by these Rules and Orders to be transmitted to the bishop, shall be either delivered at or sent by post in a registered packet to the registry of the diocese within the jurisdiction of which the church or burial ground, to which the representation relates, is situate. Such registry is hereinafter called "the Diocesan Registry," and the registrar thereof is hereinafter called "the Diocesan Registrar." The word "complainant" is hereinafter used to designate the person (or persons if more than one) making the representation.

II.

All documents required by the Act or by these Rules and Orders to be transmitted to the archbishop or the judge shall be either delivered at or sent in manner above mentioned to the registry of the Arches Court of Canterbury (when the matter arises within the province of Canterbury), or the registry of the Chancery Court of York (when the matter arises within the province of York). Such registry is hereinafter called "the Provincial Registry," and the registrar thereof is hereinafter called "the Provincial Registrar."

III.

All documents and notices required by these Rules and Orders to be transmitted to the diocesan or provincial registries may be either delivered at or sent in manner above mentioned to such registries, and all documents and notices to be issued from the said registries may be sent by post in like manner.

IV.

The forms of declaration and representation are printed in the Appendix, Nos. 1, 2, and 3. The declaration, No. 1, in cases where such declaration is required, and in other cases the representation, is to be acompanied by an address, to which documents and notices for the complainant may be sent. The diocesan registrar shall acknowledge the receipt of all documents on the days on which they shall be respectively received.—A form of receipt is given in the Appendix, No. 4.

V.

The bishop may call attention by notice in writing to any formal defects which may appear on the face of the representation, and require the same to be amended by the complainant.—A form of such notice is given in the Appendix, No. 5.

VI.

Within 21 days after the receipt of the representation, unless the bishop directs that proceedings shall not be taken on it, Form No. 6, the diocesan registrar shall transmit a copy thereof

and of the declarations to the person complained of, hereinafter called the "respondent," addressed to him at the parish to which the representation relates, together with a form of receipt to be signed by the respondent, and returned to the diocesan registry. The form of receipt is given in the Appendix, No. 7. If at the end of a week after the transmission of the representation the signed receipt shall not be returned to the diocesan registry, the diocesan registrar shall cause a duplicate copy of the representation to be personally served upon the respondent; or in case personal service cannot be effected, the diocesan registrar shall substitute such other mode of service as the bishop may direct. The expense of such personal or substituted service shall be borne by the respondent, unless the bishop shall otherwise order.

VII.

Consent to submit to bishop's directions.

The diocesan registrar shall, concurrently with such transmission of the copy of the representation, also transmit to the complainant and respondent respectively the form of consent given in the Appendix to submit to the directions of the bishop touching the representation, together with the requisition relating thereto; and such consent is to be signed and returned into the diocesan registry within 21 days, if the parties desire the representation to be heard and determined by the bishop.—The forms of requisition and consent are Nos. 8 and 9 in the Appendix.

VIII.

Special case for judge's opinion.

At any time after the return of such consents, and before the expiration of the said 21 days, a special case, signed by the parties and a barrister-at-law, for the opinion of the judge, may be transmitted to the bishop. Such case is to contain a succinct statement of facts, followed by a distinct statement of the questions submitted for the opinion of the judge.—A form of special case is given in the Appendix, No. 10.

IX.

The special case shall be forthwith transmitted, Form No. 11, by the diocesan registrar to the judge, who shall be at liberty to require the same to be amended, and to order the transmission to

the provincial registry of the representation, and all documents relating thereto.

X.

The provincial registrar shall give notice in writing to the parties of the time and place appointed by the judge for the hearing of the special case; and on the determination thereof the provincial registrar shall transmit to the diocesan registrar the determination of the judge, together with the representation and other documents in his possession.

XI.

Transmission to archbishop of representation in case of non-submission to bishop.

If the parties, or either of them, shall fail to return to the diocesan registry the consent, duly signed, to submit to the bishop's directions, within 21 days after the same shall have been sent to them as aforesaid, the diocesan registrar shall forthwith transmit the representation to the archbishop, who shall thereupon require the judge to hear the same.—The forms of such transmission and requisition are given in the Appendix, Nos. 12 and 13.

XII.

Security for respondent's costs.

The complainant shall deposit in the provincial registry such a sum of money as the judge, upon the report of the provincial registrar, shall order, or a bond with two sureties for the like sum, as security for the costs of the respondent, together with an affidavit of justification by the sureties.—A form of bond and of affidavit of justification is given in the Appendix, Nos. 14 and 15.

XIII.

The judge shall be at liberty, upon the application of the respondent, after the answer and reply (if any) shall have been transmitted, to order further security to be given in manner above set forth, to such amount as he shall think proper.

XIV.

For the purpose of fixing the amount of such further security the parties must attend the provincial registrar upon summons to be taken out by the respondent, and the provincial registrar shall report to the judge.

XV.

Notice of hearing before judge.

After security shall have been given, the provincial registrar shall forthwith give notice to the parties of the time and place appointed by the judge for hearing the said representation; such notice not to be less than twenty-eight days.

XVI.

Answer to representation, &c.

The answer (if any) of the respondent shall be delivered at or transmitted to the provincial registry within 21 days of the date of such notice, and be accompanied by an address to which documents and notices for him may be sent.

XVII.

It shall not be lawful for the complainant, except with the leave of the judge, to reply to such answer. Such reply, if allowed, is to be delivered at or transmitted to the provincial registry within such time as the judge may direct.

XVIII.

Either party shall be at liberty to apply to the judge or the provincial registrar for an Order upon the other party to amend the representation, answer, or other statement respectively, or for liberty to correct errors in their own statements.—A form of answer and reply is given in the Appendix, Nos. 16 and 17.

XIX.

Evidence at the hearing.

A form of agreement is given in the Appendix, No. 18, to be signed by all parties, and delivered at or transmitted to the provincial registry before the hearing, in case they desire that the evidence shall be taken down by a shorthand writer, and that the shorthand writer's notes, duly certified by him, shall be used on appeal, and that a special case shall not be stated.

XX.

Copy of judgment, &c., to be transmitted to bishop.

The provincial registrar shall transmit to the diocesan registry an official copy of the judgment and of the special case (if any), and the fees payable in respect of such copies shall be paid by the complainant in the first instance, but shall be costs in the cause.

The fees payable in respect of any such copies applied for by the parties shall be paid by them respectively on making application.

XXI.

Attendance of registrar at hearing.

At every hearing before the judge, whether of the representation or of any incidental matter, and whether in court or chambers, the judge shall be attended by the provincial registrar if sitting in London, or Westminster, or at York, or the diocesan registrar if sitting elsewhere. Such diocesan registrar shall transmit to the provincial registrar the minutes of the proceedings at the hearing to be recorded by him. The judge, when sitting in London or Westminster, shall be at liberty to substitute the registrar of the Arches Court of Canterbury for the registrar of the Chancery Court of York, although the matter may have arisen within the province of York, but such registrar shall transmit to the provincial registry at York the minutes of the proceedings to be recorded therein. The registrars shall, in addition to the other duties hereby required of them, file and preserve all documents received at their respective registries, other than those which they are required to transmit elsewhere. The bishop shall, in like manner, be attended by the diocesan registrar, who shall be charged with like duties in all proceedings before the bishop.

XXII.

Monition.

A monition, if ordered by a bishop or the judge, shall be issued from the diocesan or provincial registry (as the case may be), upon the application of the complainant and the delivery of a præcipe for the same.

Forms of monition and præcipe are given in the Appendix Nos. 19 and 20.

XXIII.

Appeal.

A party desirous of appealing from a judgment or monition shall deliver into the provincial registry a notice of appeal within 15 days of the service of the monition, in a case where a monition is issued, and in any other case within 15 days of the date or the judgment; and thereupon the certified notes of evidence, or the special case settled by the judge (as the case may be), shall be

transmitted by the provincial registrar with the other documents to the appeal registry in manner required by the Court of Appeal.

A form of notice of appeal is given in the Appendix, No. 21.

XXIV.

Suspension pending appeal of the execution of a monition.

A respondent shall be at liberty at any time after notice of appeal shall have been given to apply for a summons against the complainant to shew cause why the execution of a monition should not be suspended pending the appeal. At the hearing of such summons the judge will require such evidence and make such order as he shall think fit.

PD. 364 — 385

XXV.

A suspension, if ordered by the judge, shall be issued from the provincial registry upon the application of the respondent, and the delivery of a præcipe for the same.

Forms of suspension and præcipe are given in the Appendix, Nos. 22 and 23.

XXVI.

Enforcing obedience.

It shall be competent for the complainant, at any time after the service of a monition, to apply for a summons against the respondent, to show cause why an inhibition should not issue to enforce obedience to the monition. Such application shall be supported by the report of the bishop, Form No. 24 in the Appendix, in case of disobedience to a bishop's monition, or an affidavit in case of disobedience to the judge's monition. At the hearing of such summons the judge will require such further evidence as he shall think fit.

XXVII.

An inhibition, if ordered by the judge, shall be issued from the provincial registry upon the application of the complainant, and the delivery of a præcipe for the same.

Forms of inhibition and præcipe are given in the Appendix, Nos. 25 and 26.

XXVIII.

At the expiry of the term named in the inhibition it shall be competent for the respondent, on delivering an undertaking to

obey the monition, Form No. 27 in the Appendix, to apply for a summons against the complainant, to shew cause why a relaxation should not issue, and, if ordered by the judge, the relaxation shall be issued from the provincial registry, upon the application of the respondent, and the delivery of a præcipe for the same.

Forms of relaxation and præcipe are given in the Appendix, Nos. 28 and 29.

XXIX.

A monition, inhibition, and relaxation, when signed by the provincial or diocesan registrar (as the case may be) shall be effectual without further attestation.

XXX.

Every monition and inhibition shall be personally served, except in cases where personal service cannot be effected, when such other mode of service shall be substituted as the judge or registrar may direct. Such instruments shall be returnable into the provincial or diocesan registry (as the case may be) within a week of such service respectively.

XXXI.

A copy of every inhibition to enforce obedience to a bishop's monition shall be transmitted to the bishop by the provincial registrar.

XXXII.

Enforcing obedience of dean and chapter.

In the event of obedience not being rendered to any monition relating to the fabric, ornaments, furniture, or decorations of a cathedral or collegiate church, a precept, if ordered by the judge, shall be issued from the provincial registry upon the application of the complainant, and the delivery of a præcipe for the same, authorizing the registrar or other person or persons named by the judge to carry into effect the directions contained in the said monition.—Forms of such precept, and præcipe, and of sequestration of the profits of the preferments held in such cathedral or collegiate church by the dean and chapter thereof, are given in the Appendix, Nos. 30, 31, and 32.

XXXIII.

Subpœnas.

A subpœna may include the names of any number of witnesses. The party shall take it, together with a præcipe, to the provincial registry, where it shall be signed, and the præcipe deposited.—Forms are given in the Appendix, Nos. 33, 34, 35, and 36.

XXXIV.

Admission of documents.

Either party may call upon the other, by notice in writing, to admit any document, saving just exceptions, and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the hearing the judge shall certify that the refusal was reasonable; and no costs of proving any document shall be allowed as costs in the cause, except in cases where the omission to give the notice was in the opinion of the registrar a saving of expense. A form of notice to admit is given in the Appendix, No. 37.

XXXV.

Notices.

All notices required by these rules and orders shall be in writing, and signed by the party.

XXXVI.

Service of notices, &c.

It shall be sufficient to transmit all notices and other documents intended for the complainant to the address furnished by him as aforesaid, and to address all notices and other documents intended for the respondent to the parish to which the representation relates, unless and until the respondent shall furnish to the diocesan registry or the provincial registry (as the case may be) another address to which documents may be sent, from which time all such notices and other documents shall be sent to such other address.

XXXVII.

Appearance by proctor or solicitor.

Whenever an appearance is entered by a proctor or solicitor for a complainant or respondent, all notices and other documents required by these rules and orders to be transmitted to or by the parties, shall, in lieu thereof, be transmitted or delivered to or by

their proctor or solicitor at the address furnished by him, and all acts to be done by the parties may be done by their proctors or solicitors.—A form of appearance is given in the Appendix, No. 38.

XXXVIII.

Change of proctor or solicitor.

A party may obtain an order to change his proctor or solicitor upon application by summons to the judge, or, in his absence, to the provincial registrar. In case the former proctor or solicitor neglects to file his bill of costs for taxation at the time required by the order served upon him, the party may, with the sanction of the judge or provincial registrar, proceed by the new proctor or solicitor without previous payment of such costs.

XXXIX.

Time fixed by these Rules.

The judge shall in every case in which a time is fixed by these Rules and Orders for the performance of any act have power to extend the same with such qualifications and restrictions, and on such terms as to him may seem fit.

XL.

To prevent the time limited for the performance of any act, or for any proceeding in default, from expiring before application can be made to the judge for an extension thereof, the provincial registrar may, upon reasonable cause being shewn, extend the time.

XLI.

The time fixed by these Rules and Orders for the performance of any act shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

XLII.

Affidavits.

Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein. Affidavits may be sworn before the judge, or any provincial or diocesan registrar, or a Commissioner to administer oaths in Chancery.

XLIII.

In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat.

XLIV.

No affidavit will be admitted in which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure, or in which there is any interlineation the extent of which, at the time when the affidavit was sworn, is not clearly shewn by the initials of the authority before whom it was sworn.

XLV.

Where an affidavit is made by any person who is blind, or who from his or her signature, or otherwise, appears to be illiterate, the authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature thereto, in the presence of the authority.

XLVI.

No affidavit is to be deemed sufficient which has been sworn before the party, on whose behalf the same is offered, or before his proctor or solicitor, or before a partner or clerk of his proctor or solicitor.

XLVII.

Proctors and solicitors, and their clerks respectively, if acting for any other proctor or solicitor, shall be subject to the rules and orders in respect of taking affidavits which are applicable to those in whose stead they are acting.

XLVIII.

Where a special time is fixed for filing affidavits, no affidavit filed after that time shall be used unless by leave of the judge.

XLIX.

The above rules and orders in respect to affidavits shall, so far

as the same are applicable, be observed in respect to affirmations and declarations.

L.

All bills of costs are referred to the registrar of the respective registry for taxation, and may be taxed by him without any special order for that purpose. Such bills are to be filed in the registry. Taxing bills of costs.

LI.

Notice of the time appointed for taxation will be forwarded to the party filing the bill at the address furnished by such party.

LII.

The party who has obtained an appointment to tax a bill of costs shall give the other party to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed.

LIII.

When an appointment has been made by the registrar for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the party not in attendance had due notice of the time appointed.

LIV.

The bill of costs of any proctor or solicitor will be taxed on his application as against his client after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons after sufficient notice given to the practitioner.

LV.

The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill; but if more than one-sixth of the

amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof, no costs incurred in such taxation shall be allowed as part of such bill.

LVI.

If an order for payment of costs is required, the same may be obtained by summons on the amount of such costs being certified by the registrar. A form of monition for costs is given in the Appendix, No. 39.

LVII.

Summonses.

Where the decision of the judge is required, a summons may be taken out by either party in reference to any incidental matter arising out of or connected with any proceedings under the Act. A form is given in the Appendix, No. 40.

LVIII.

A true copy of the summons is to be served on the party summoned three clear days at least before the summons is returnable, and before five o'clock p.m. On Saturdays the copy of the summons is to be served before two o'clock p.m.

LIX.

On the day and at the hour named in the summons the party taking out the same is to present himself with the original summons, before the judge at the place appointed for hearing the same.

LX.

Both parties will be heard by the judge, who will make such order as he may think fit, and a minute of such order will be made by the provincial registrar.

LXI.

If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the judge, who will thereupon make such order as he may think fit.

LXII.

An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the judge on that occasion.

LXIII.

If a formal order is desired, the same may be obtained from the provincial registrar on the application of either party, and for that purpose the original summons, or the copy, served on the party summoned must be filed on the provincial registry. An order will thereupon be drawn up and delivered to the person filing such summons or copy.

LXIV.

If a summons is brought to the provincial registry with consent to an order endorsed thereon signed by the party summoned, or by his proctor or solicitor, an order will be drawn up without the necessity of going before the judge, provided that the order sought is in the opinion of the provincial registrar one which under the circumstances would be made by the judge.

LXV.

Cases not provided for.

In any case not provided for by these rules the directions of the judge shall be obtained upon a summons to be taken out by the party requiring such directions.

Note.—In the event of the judge becoming official principal of the Arches Court of Canterbury, or of the Chancery Court of York, these rules and orders and the forms and fees prescribed shall be applicable mutatis mutandis to all cases thereafter arising, such necessary alterations in the style of the forms being made as the judge may direct.

APPENDIX.

FORMS,

Which are to be followed as nearly as the circumstances of each case will allow.

No. 1.

Declaration.

Public Worship Regulation Act, 1874.

I [We], *C. D.*, of , do hereby solemnly declare that I am a member of the Church of England as by law established.

Witness my hand this day of 187 .

(signed) *C. D.*

Address to which documents and notices for the complainant may be sent.

[*Here insert address.*]

(signed) *C. D.*

No. 2.

Representation.

Public Worship Regulation Act, 1874.

To the Right Reverend Father in God, *A.*, by Divine Permission, Lord Bishop of *B.*

I [We], *C.D.*, Archdeacon of the archdeaconry of [*or* a churchwarden *or* three parishioners of the parish of *E.*] in your Lordship's diocese, do hereby represent that [*the person complained of*] has [*state the matter to be represented; if more than one, then under separate heads*].

Dated this day of 187 .

(signed) *C. D.*

Note.—The nature of the complaint is to be stated generally. A detailed statement of facts is not to be given.

No. 3.

Public Worship Regulation Act, 1874.

Statutory declaration affirming the truth of the representation.

I, *C. D.*, of , do hereby solemnly and sincerely declare as follows: that the several statements contained in the representation hereunto annexed made by me in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of, are true according to the best of my knowledge and belief. And I make this solemn declaration conscientiously believing the same to be true, and by virtue of an Act of Parliament, &c., &c. (*Statutory Form*).

Declared by, &c. &c.

(signed) *C. D.*

Note.—This declaration must also shew that the complainant is duly qualified under the Act to make the representation.

No. 4.

The Diocesan Registry of *B.*

Registrar's receipt for documents.

Public Worship Regulation Act, 1874.

I HEREBY acknowledge to have received this day of 187 , the undermentioned documents:—

Declaration of *C. D.*, that he is a member of the Church of England, dated day of 187 .

[*or*]

1. Representation bearing date day of 187 , made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.
2. Statutory declarations made by *C. D.*
3. . . . . .
4. . . . . .

(signed) *X. Y.*,
Diocesan Registrar.

No. 5.

The Diocesan Registry of *B.*

Notice by bishop requiring amendment of representation.

Public Worship Regulation Act, 1874.

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act,

1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

We, *A.*, Bishop of *B.*, hereby require you within eight days hereof to amend the representation transmitted by you in the following particulars:—

[*Here state the particulars requiring amendment.*]

Dated this day of 187 .

To *C. D.* (signed) *X. Y.*,
Diocesan Registrar.

No. 6.

Statement by bishop of his reason why proceedings should not be taken on representation.

The Diocesan Registry of *B.*

Public Worship Regulation Act, 1874.

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

We, *A.*, Bishop of *B.*, having in pursuance of the provisions of the Public Worship Regulation Act, 1874, considered the whole circumstances attending the above representation, are of opinion that proceedings should not be taken thereon for the following reason [*here state the reason for Bishop's opinion*].

Dated this day of 187 .

(signed) *A.*

No. 7.

Respondent's receipt for representation and other documents.

The Diocesan Registry of *B.*

Public Worship Regulation Act, 1874.

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

I, the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, do hereby acknowledge to have received this day 187 , the undermentioned documents:—

1. Declaration of *C. D.*, that he is a member of the Church of England.
2. The said representation.
3. Statutory declaration.
4. . . . . .
5. . . . . .

(signed) *E. F.*

No. 8.

Requisition by bishop as to consent of parties to submit to his directions.

The Diocesan Registry of *B.*

Public Worship Regulation Act, 1874.

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

We, *A.*, Bishop of *B.*, hereby require you to state in writing within 21 days from the date hereof whether you are willing to submit to our directions, without appeal, touching the matter of the above-mentioned representation.

Dated this day of 187 .

(signed) *X. Y.*,
Diocesan Registrar.

To *C. D.*, the Complainant, [*or*]
To the Reverend *F. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, the respondent.

No. 9.

Consent to submit to bishop's directions.

Public Worship Regulation Act, 1874.

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar. &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

I, *C. D.*, the complainant [*or* the Reverend *E. F.*, the respondent], do hereby state in writing that I am willing to submit, without appeal, to the directions of the Right Reverend *A.*, Lord Bishop of *B.*, touching the matter of the said representation.

Dated this day of 187 .

(signed) *C. D.* *or* *E. F.*

To the Right Reverend Father in God,
A., Lord Bishop of *B.*

No. 10.

Special case for the opinion of the judge

The Diocesan Registry of *B.*

Public Worship Regulation Act, 1874.

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in

which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

Special Case stated for the opinion of the Judge.

[*Here follow statements of facts in paragraphs.*]

1. . . . . .
2. . . . . .
3. . . . . .

and

The questions for the opinion of the judge are,—

1. . . . . .
2. . . . . .
3. . . . . .

(signed) *C. D.*
E. F.
Barrister-at-Law.

We, the said *C. D.* and *E. F.*, hereby require this special case to be transmitted to the judge for hearing.

Dated this day of 187 .

(signed) *C. D.*
E. F.

To the Diocesan Registrar of *B.*

No. 11.

Transmission of special case by the bishop to the judge.

A., by Divine permission, Bishop of *B.*, to the Right Honourable James Plaisted, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York]: Greeting:

Whereas in the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in our diocese of *B.*, is the person complained of, the parties have stated their willingness to submit to our directions, without appeal, touching the matter of the said representation, and have joined in stating certain questions arising in the said matter in a special case for the opinion of the judge, and have required us to transmit the same to the judge for hearing.

Now, therefore, we, the bishop aforesaid, do hereby transmit the said special case to you, the judge aforesaid, requesting that you will proceed to hear and determine the questions arising thereon in accordance with the provisions of the said Act.

Given under our hand this day of 187 .

(signed) *X. Y.*,
Diocesan Registrar.

No. 12.

A., by Divine permission, Bishop of *B.*, to the Right Honourable and Most Reverend Archibald Campbell, Lord Archbishop of Canterbury [*or* William, Lord Archbishop of York]: Greeting:

Transmission of representation to archbishop in case of non-submission to bishop.

WHEREAS a representation has been made to us by *C. D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in our diocese of *B.*, is the person complained of:

And whereas the said *C. D.* and *E. F.* have failed within the time prescribed by the said Act to state their willingness to submit to our directions touching the matters of the said representation:

Now we, the Bishop aforesaid, do hereby transmit the said representation to your Grace in accordance with the provisions of the said Act.

Dated this day of 187 .

(signed) *X. Y.*,
Diocesan Registrar.

No. 13.

Archibald Campbell, by Divine Providence, Archbishop of Canterbury [*or* William, Archbishop of York], to the Right Honourable James Plaisted, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York]: Greeting:

Requisition from archbishop to judge to hear representation.

WHEREAS the Right Reverend Father in God, *A.*, Lord Bishop of *B.*, has transmitted to us a representation made by *C. D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of:

And whereas the said Bishop has signified to us that the said parties have not within the time prescribed by the said Act for that purpose stated their willingness to submit to his directions touching the matter of the said representation:

Now we, the Archbishop aforesaid, do hereby require you, the Judge aforesaid, to hear and determine the matter of the said representation at any place in London or Westminster, or within the said diocese of *B.*, as you may deem fit.

Given under our hand this day of 187 .

(signed) *A. C.*, Cantuar.
or
W., Ebor.

No. 14.

Bond for securing respondent's costs.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

KNOW all men by these presents, that we, *C. D.*, of, &c., *L. M.*, of &c., and *N. O.*, of, &c., are held and firmly bound unto *X. Y.*, the Registrar of the Provincial Court of Canterbury [*or* York], in the penal sum of pounds of good and lawful money of Great Britain, to be paid to the said *X. Y.*, for which payment to be well and truly made we bind ourselves, and every of us, for the whole, our heirs, executors, or administrators, firmly by these presents, sealed with our seals. Dated the day of 187 .

Whereas a representation has been made by *C. D.*, to the Right Reverend *A.*, Bishop of *B.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of:

Now the condition of this obligation is such, that if the above-bounden *C. D.*, his heirs, executors, or administrators, shall, if so ordered by the Right Honourable James Plaisted, Baron Penzance, a Judge of the said Court, well and truly pay, or cause to be paid, to the above-named *E. F.*, his heirs, executors, administrators, or assigns, the full sum of pounds of good and lawful money of Great Britain, or the lawful costs of the said *E. F.*, of and incidental to the said representation to the extent of pounds, then this obligation is to be void and of none effect, otherwise to remain in full force and virtue.

Signed, sealed, and delivered by the said *C. D.*, *L. M.*, and *N. O.*, in the presence of

A Commissioner to Administer Oaths in Chancery in England.

C. D. (L. S.)

L. M. (L. S.)

N. O. (L. S.)

No. 15.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

Affidavit of justification.

WE, *L. M.*, of , and *N. O.*, of , the proposed sureties for *C. D.*, in the annexed bond, severally make oath and say that we are respectively worth the sum of pounds sterling, after payment of all our just debts, and we further severally make oath that we are not sureties in any other matter [*or* that we are respectively sureties in the sum of pounds for (*here specify particulars of any other suretyship*), but not in any other matter, and that we are respectively worth the said sum of pounds, after payment of the amount of the said suretyships, if the same shall become payable, as well as of our just debts.]

(signed) *L. M.*
N. O.

Sworn by, &c.

No. 16.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

Answer of respondent to representation.

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

I, THE Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, in answer to the said representation, say:—

1. That [*here state which of the facts alleged in the representation he denies, and succinctly the general grounds of defence; and, if more than one, under separate heads*].

Note.—A detailed statement of facts is not to be given.

Whereupon I humbly pray that I may be dismissed from all further observance of justice in the matter of the said representation.

Dated this day of 187 .

(signed) *E. F.*

No. 17.

Reply, or any further statement.

THESE are to follow, in point of form, the directions given above as to the answer.

No. 18.

Agreement as to notes of evidence by shorthand writer.

Public Worship Regulation Act, 1874.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

WE, *C. D.*, &c , and the Reverend *E. F.*, clerk, the complainant and respondent respectively in the above matter, do hereby agree that the evidence at the hearing of the representation shall be taken down by a shorthand writer, and that a special case shall not be stated by the judge.

Dated this day of 187 .

(signed) *C. D.*
E. F.

No. 19.

Monition.

A., BY DIVINE PERMISSION, BISHOP OF *B.*,

or

JAMES PLAISTED, BARON PENZANCE, a Judge of the Provincial Court of Canterbury [*or* York], to *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.* Greeting—

WHEREAS at the hearing of the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which you, the said *E. F.*, are the person complained of, we did pronounce that [*here state tenor of judgment*] :

Now we do therefore command you, the said *E. F.*, to [*here state particulars of monition*], and herein fail not.

Given at the day of 187 .

(signed) *X. Y.*,
Diocesan Registrar *or* Provincial Registrar.

No. 20.

Præcipe for Monition.

IN THE DIOCESAN REGISTRY OF *B.*,

or

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of the representation of *C. D.*, made in pursuance of

the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

PRÆCIPE for a monition against the respondent, in pursuance of the order of the Right Honourable James Plaisted, Baron Penzance, a judge of the said Court, made on the day of 187 .

Dated this day of 187 .

(signed) *C. D.*

To *X. Y.*,
The Diocesan Registrar *or* Provincial Registrar.

No. 21.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

Appeal from judgment or monition.

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

WHEREAS at the hearing of the above representation the Right Honourable James Plaisted, Baron Penzance, a judge of the said Court, did on the day of 187 , order (*here state tenor of judgment*) [*or* issue a monition commanding the said *E. F.* to, &c.] (*here state tenor of monition*):

And whereas the said monition was served on the said *E. F.*, on the day of 187 .

Now therefore, take notice that I, the said *C. D.* [*or E. F.*], hereby appeal from the said order [*or* monition] to Her Majesty in Council.

Dated this day of 187 .

(signed) *C. D.*
or
E. F.

To *X. Y.*,
The Provincial Registrar.

No. 22.

Suspension of monition pending appeal.

JAMES PLAISTED, BARON PENZANCE, a judge of the Provincial Court of Canterbury [*or* York], to *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, greeting: Whereas in the matter of a representa-

tion made by *C. D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the said *E. F.* is the person complained of, a monition was issued by us [*or* by the Right Reverend *A.*, Lord Bishop of *B.*], bearing date the day of 187 , and duly served on the said *E. F.*, commanding him to, &c. [*here state tenor of monition*]: And whereas the said *E. F.* has duly appealed from the said monition to Her Majesty in Council: now we do hereby, on the application of the said *E. F.*, and for certain good reasons to us made known, suspend the execution of such monition pending the said appeal, or until we shall otherwise order.

Given at the day of 187 .

(signed) *X. Y.*,
Provincial Registrar.

No. 23.

Præcipe for suspension of monition pending appeal.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

PRÆCIPE for suspension of monition pending appeal, in pursuance of the order of the Right Honourable James Plaisted, Baron Penzance, a judge of the said Court, made on the day of 187 .

Dated this day of 187 .

(signed) *E. F.*

To *X. Y.*,
The Provincial Registrar.

No. 24.

Report by the bishop of the respondent's disobedience to monition.

A., by Divine permission, Bishop of *B.*, to the Right Hon. James Plaisted, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York], greeting:

WHEREAS, in the matter of the representation of *C. D.*, made in pur-

suance of the provisions of the Public Worship Regulation Act, 1874, wherein *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in our diocese of *B.*, is the person complained of, a monition was issued under our hand, bearing date the day of 187 , commanding the said *E. F.* to [*here set out tenor of monition*]:

Now we, the Bishop aforesaid, do hereby certify and make known to you, the Judge aforesaid, that it has been made to appear to us that the said *E. F.* has failed to obey our aforesaid monition by [*here state the acts of disobedience*], and we do hereby request that you, the judge aforesaid, will direct such proceedings to be taken as may be necessary to enforce the obedience of the said *E. F.* to our aforesaid monition.

Given under our hand this day of 187 .

(signed) *A.*

No. 25.

Inhibition.

2PD.130

JAMES PLAISTED, BARON PENZANCE, a Judge of the Provincial Court of Canterbury [*or* York], to all and singular literate persons in and throughout the said province, greeting: Whereas, in the matter of a representation made by *C. D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of, a monition was issued by us [*or* by the Right Reverend *A.*, Lord Bishop of *B.*], bearing date the day of 187 , and duly served on the said *E. F.*, commanding him to, &c. [*here state tenor of monition*]: And whereas it has been made to appear before us that the said *E. F.* has failed to pay due obedience to the said monition in regard to the following matters; that is to say [*here state the acts of disobedience*]:

We do therefore hereby order, that for such his disobedience he, the said *E. F.*, be inhibited for the term of months from the time of the publication of this inhibition, and thereafter until the same shall have been duly relaxed, from performing any service of the Church, or otherwise exercising the cure of souls within the said diocese; and we do hereby command that you, or some or one of you, do on Sunday next, the day of , or on the Sunday next after the receipt by you of these presents, previous to the commencement of Divine Service in the parish church of *I. K.* aforesaid, by affixing these presents on the principal door of the said church, and leaving thereon affixed a true copy hereof, and also by shewing these presents to the said *E. F.* and by leaving with him a true copy hereof, notify to him, and to all

others whom it may concern, that he, the said *E. F.*, is inhibited as aforesaid from performing any service of the Church, or otherwise exercising the cure of souls within the said diocese, and hereof fail not.

Given at the day of 187 .

(signed) *X. Y.*,
Provincial Registrar.

No. 26.

Præcipe for inhibition.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of:

PRÆCIPE for inhibition against the Respondent, in pursuance of the order of the Right Honourable James Plaisted, Baron Penzance, a Judge of the said Court, made on the day of 187 .

(signed) *C. D.*

To *X. Y.*,
The Provincial Registrar.

No. 27.

Undertaking by respondent to obey monition.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of a representation made by *C. D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which I, the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, am the person complained of:

WHEREAS a monition was issued by the Right Reverend *A.*, Lord Bishop of *B.* [*or* by the Right Honourable James Plaisted, Baron Penzance, a Judge of the said Court], bearing date the day of 187 , commanding me to, &c. [*here state tenor of monition*]: And whereas by reason of my having failed to obey the said monition I was inhibited by the Judge aforesaid for the term of months from performing any service of the Church, or otherwise exercising the cure of souls within the said diocese: And whereas the said term has expired:

Now I, the said *E. F.*, do hereby undertake to pay due obedience for the future to such monition, and at all times to observe and do as therein ordered.

Dated this day of 187 .

(signed) *E. F.*

Witness

No. 28.

Relaxation of inhibition.

JAMES PLAISTED, BARON PENZANCE, a Judge of the Provincial Court of Canterbury [*or* York], to all and singular literate persons in and throughout the said province, greeting: Whereas in the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of, an inhibition was issued by us bearing date the day of 187 , whereby, by reason of the said *E. F.* having failed to obey a certain monition issued by us [*or* by the Right Reverend *A.*, Lord Bishop of *B.*], he was inhibited for the term of months from performing any service of the Church, or otherwise exercising the cure of souls within the said diocese: And whereas the said term has expired, and the said *E. F.* has undertaken to pay due obedience for the future to the said monition:

Now we do therefore relax the said inhibition, justice so requiring.

Given at the day of 187 .

(signed) *X. Y.*,
Provincial Registrar.

No. 29.

Præcipe for relaxation.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

IN the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector, [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of:

PRÆCIPE for Relaxation against the respondent, in pursuance of the Order of the Right Honourable James Plaisted, Baron Penzance, the Judge of the said Court, made on the day of 187 .

Dated this day of 187 .

(signed) *C. D.*

To *X. Y.*,
The Provincial Registrar.

No. 30.

Precept to carry into effect directions of a monition in the case of a cathedral or collegiate church.

JAMES PLAISTED, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York], to *X. Y.*, the Registrar of the said Court, greeting: Whereas in the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Dean and Chapter of the Cathedral [*or* Collegiate Church] of , in the diocese of *B.*, are complained of, a monition was issued by us [*or* by the Right Reverend *A.*, Lord Bishop of *B.*], bearing date the day of 187 , and duly served, commanding the said Dean and Chapter to [*here state tenor of monition*]: And whereas it has been made to appear before us that the said Dean and Chapter have failed to pay due obedience to the said monition in regard to the following matters; (that is to say) [*here state the acts of disobedience*]:

We do therefore hereby authorize and command you, the said *X. Y.*, to carry into effect the directions contained in such monition, and report to us the cost of so doing and what you shall do in the premises you shall duly certify to us.

Given at the day of 187 .

(signed) *X. Y.*,
Provincial Registrar.

No. 31.

Præcipe for precept.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

IN the matter of the representation of *C. D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Rev. *E. F.*, clerk, rector, [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

Præcipe for Precept to carry into effect the monition bearing date the day of 187 .

Dated this day of 187 .

To *X. Y.*, (signed) *C. D.*
The Provincial Registrar.

No. 32.

Sequestration of preferments of a dean and chapter.

JAMES PLAISTED, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York], to [*here insert the names of sequestrators*],

greeting: Whereas in the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Dean and Chapter of the Cathedral [*or* Collegiate Church] of , in the diocese of *B.*, are complained of, a precept was duly issued by us to *X. Y.*, the Provincial Registrar of the said Court, in pursuance of the said Act, bearing date the day of , 187 , authorizing and commanding him to carry into effect the directions contained in a certain monition issued by us [*or* by the Right Reverend *A.*, Lord Bishop of *B.*], bearing date the day of , 187 : And whereas the said *X. Y.* has certified to us that he has carried into effect the said directions, and that in so doing the sum of has been necessarily expended:

We do therefore command you to take and sequester into your possession the rents, tithes, rent-charges in lieu of tithes, oblations, obventions, fruits, issues, and profits, and all other ecclesiastical goods held in such Cathedral [*or* Collegiate Church] by the Dean and Chapter thereof, and that you hold the same in your possession until you have levied the said sum of , or until our further direction herein, and that you from time to time report to us what you shall do in the said premises.

Given at , this day of 187 .

(signed) *X. Y.*,
Provincial Registrar.

No. 33.

Subpœna ad testificandum.

JAMES PLAISTED, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York], to [*names of all witnesses included in the subpœna to be inserted*], greeting: We command you and every of you to be and appear in your proper persons before us at , in the county of on the day of 187 , by eleven of the clock in the forenoon of the same day, and so from day to day until you shall be discharged, to testify the truth according to your knowledge in the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of, on the part of the said *C. D.* [*or E. F.*], and on the aforesaid day to be heard before us. And this you or any of you shall by no means omit.

Given at the day of 187 .

(signed) *X. Y.*,
Provincial Registrar.

No. 34.

Præcipe for subpœna ad testificandum.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

PRÆCIPE for subpœna for [*insert witnesses' names*], to testify on the part of the complainant [*or* respondent] in the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

Dated this day of 187 .

(signed) *C. D.*
or
E. F.

No. 35.

Subpœna duces tecum.

JAMES PLAISTED, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York], to [*names of all witnesses included in the subpœna to be inserted*], greeting: We command you and every of you to be and appear in your proper persons before us at in the county of on the day of 187 , by of the clock in the noon of the same day, and so from day to day until you shall be discharged, and also that you bring with you and produce at the time and place aforesaid [*here describe shortly the deed, letter, paper, &c. required to be produced*], then and there to testify and shew all and singular those things which you or either of you know, or the said deed or document doth import, of and concerning the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of, on the part of the said *C. D.* [*or E. F.*], and on the aforesaid day to be heard before us. And this you or any of you shall by no means omit.

Given at the day of 187 .

(signed) *X. Y.*,
Provincial Registrar.

No. 36.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

Præcipe for subpœna duces tecum.

PRÆCIPE for subpœna for [*insert witnesses names*], to testify and produce, &c., on the part of the complainant [*or* respondent] in the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

Dated this day of 187 ,

(signed) *C. D.*
or
E. F.

No. 37.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK.]

Public Worship Regulation Act, 1874.

Notice to admit documents.

TAKE notice that in the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of, the said *C. D.* [*or* *E. F.*] proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the said *E. F.* [*or* *C. D.*], his proctor, solicitor, or agent, at , on , between the hours of ; and the said *E. F.* [*or* *C. D.*] is hereby required within 48 hours from the last-mentioned hour to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been, that such as are specified as copies are true copies, and such documents as are stated to have been sent or delivered were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated this day of 187 .

(signed) *C. D.*
or
E. F.

To *E. F.*
or
C. D.

[*Here describe the documents.*]

No. 38.

Entry of appearance by a proctor or solicitor.

THE DIOCESAN REGISTRY OF *B.*

Public Worship Regulation Act, 1874.

IN the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, wherein the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

I, *G. H.*, the proctor of the said *C. D.* or *E. F.*, appear on his behalf.

Dated this day of 187 .

[*Here insert address required for communications.*]

(signed) *G. H.*

No. 39.

Monition for costs.

JAMES PLAISTED, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York], to *C. D.* or *E. F.*, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, greeting: Whereas at the hearing of the matter of a representation made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.* [*description to be omitted if mentioned before*], is the person complained of, the sum of has been found to be due from you, the said *C. D.* [*or E. F.*] to the said *E. F.* [*or C. D.*], and his proctors or solicitors, Messieurs , for the costs incurred by him in the said matter, and on which you were condemned at the hearing of the said representation:

We therefore hereby command you, the said *C. D.* [*or E. F.*] to pay within six days from the service hereof (inclusive of the day of service) the said sum of to the said *E. F.* [*or C.D., or* to the said Messieurs], and herein fail not.

Given at this day of 187 .

(signed) *X. Y.*,
Provincial Registrar.

No. 40.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK]. Summons.

Public Worship Regulation Act, 1874.

In the matter of a representation now pending before us, made by *C. D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E. F.*, clerk, rector [*or* vicar, &c.] of *I. K.*, in the diocese of *B.*, is the person complained of.

Let the said *C. D.* or *E. F.* attend before the Right Honourable James Plaisted, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York], on next, the day of 187 , at of the clock in the noon to shew cause why

[*Here state object of summons.*]

Dated this day of 187 .

(signed) *X. Y.*,
Provincial Registrar.

No. 41.

A., by Divine Permission, Bishop of *B.* to *E. F.*, rector [*or* vicar, &c.] of *I. K.*, in our said Diocese of *B.*, and all others whom it may concern, Greeting: Postponement by bishop of avoidance.

WHEREAS, in the matter of a representation made by *C. D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the said *E. F.* is the person complained of, an inhibition was issued by the Right Honourable James Plaisted, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York], bearing date the day of 187 , by reason of the disobedience of the said *E. F.*, to a certain monition issued by the said Judge [*or* by us] bearing date the day of 187 , by which inhibition the said *E. F.* was inhibited for the term of months from the time of publication thereof, and thereafter until the same should have been duly relaxed, from, *&c.*: And whereas the said *E. F.* has not undertaken to pay due obedience to the said monition, and the said inhibition has therefore not been relaxed, but has since the date thereof remained and is still in force: And whereas by reason of the premises the said rectory [*or* vicarage, *&c.*] of *I. K.* might shortly become void, unless the avoidance thereof be postponed by us in accordance with the provisions of the said Act:

Now we, the Bishop aforesaid, do hereby, for the reason that [*here*

state reason], order that, notwithstanding the said inhibition may remain in force for more than three years from the date of the said monition, the avoidance of the said rectory [*or* vicarage, *&c.*] shall be postponed for [*here state time, not exceeding three months, the date at which the same would have become void*].

Dated this day of 187 .

(signed) *X. Y.*,
Diocesan Registrar.

FEES to be taken by the Diocesan or Provincial Registries (as the case may be).

It is ordered that the Fees in the subjoined Table be paid and received in the Diocesan and Provincial Registries respectively, and that the proceeds be applied in discharge of the expenses of carrying the Act into execution, and in remunerating the officers and persons employed therein, other than the judge, in such manner, at such times, and in such proportions as the judge shall from time to time direct, until further order be made herein; provided always, that the Fees received in the Diocesan Registries shall be applied exclusively to the expenses incurred and officers employed in the Diocesan Registries and Courts, and the Fees received in the Provincial Registries to the expenses incurred and persons employed in the Provincial Courts.

		£	s.	d.
Preparation of instruments.	Registrar's receipt for documents	0	5	0
	Bishop's notice to amend representation	0	10	0
	Respondent's receipt for documents	0	5	0
	Requisition by Bishop as to submission	0	5	0
	Consent to submit	0	5	0
	Transmission of special case for opinion of Judge	0	5	0
	Transmission of representation to Archbishop	0	5	0
	Requisition to Judge to hear representation	0	5	0
	Security for costs	0	10	0
	Monition	1	0	0
	Report from Bishop to Judge of respondent's disobedience	0	10	0
	Inhibition	0	10	0
	Relaxation of ditto	0	10	0
	Precept as to cathedral church, &c.	0	10	0
	Sequestration of profits of Dean and Chapter	0	10	0
	Subpœna (for every witness)	0	2	6

	£	s.	d.	
Monition for costs	0	10	0	
On entry of an appearance by proctor or solicitor	0	5	0	Appearance.
On amending an appearance	0	5	0	
Search for appearance	0	1	0	
Filing representation	0	5	0	Filing fees.
Filing special case for the opinion of the Judge	0	5	0	
Filing answer to representation	0	5	0	
Filing reply, &c	0	5	0	
Filing every affidavit or other document not otherwise specified	0	2	6	
On each reference as to the amount of further security to be given (including Registrar's report)	0	6	8	Reference to registrar for his report.
Setting down a special case for hearing	0	5	0	Setting down.
Setting down a representation for hearing	0	5	0	
Summons to attend in chambers	0	2	6	Summons.
For entering Judge's order and summons	0	2	6	
If a final order in the matter	0	10	0	
Preparing every notice required to be given by the Registrar	0	5	0	Notices.
On every hearing before the Judge of a representation or special case, to be paid by the party setting down the same	1	10	0	Hearing.
If the hearing continues more than one day, for every subsequent day or part of day, from the same party	1	0	0	
Entering judgment, to be paid by the complainant	0	10	0	Entering judgment or order.
If the special matter thereof shall exceed five folios, for every additional folio	0	1	0	
Entering any order or decree of Judge not otherwise specified to be paid by the party obtaining the same (in case of doubt the Judge to direct)	0	5	0	
For every office copy or extract of a minute, judgment, order, or other document, if five folios or under	0	2	6	Office copies and extracts.
If exceeding five folios, per folio	0	0	6	
Every search in the Registry in reference to representation	0	1	0	Searches.
Attendance to transmit any document required to be transmitted from the Registry, in addition to postage and registration fee	0	3	4	Attendances.
Attendance on the Judge on any occasion other than a hearing	0	6	8	
For attendance to serve respondent with representation under Rule No. 6, such a sum is to be allowed as the Bishop may consider reasonable under the circumstances.				
For every oath administered by a Registrar to each deponent	0	1	0	Oath.
For marking every exhibit	0	1	0	

		£	s.	d.
Taxing costs	Taxing every bill of costs:			
	When taxed as between complainant and respondent, per folio	0	0	6
	When taxed as between practitioner and client, per folio	0	1	0
	For postponement of appointment for taxation of costs, to be paid by the party at whose instance the appointment is postponed:			
	If the bill of costs is five folios or under	0	1	0
	If exceeding five folios and under fifteen folios	0	2	6
	If exceeding fifteen folios	0	5	0
Faculty.	For every faculty granted in pursuance of the 14th section of the Act, unless otherwise ordered by the Judge	2	2	0

Note.—All folios to consist of seventy-two words.

COSTS to be allowed PROCTORS or SOLICITORS.

Instructions.	Instructions for representation, answer, reply, &c., and for declarations, special affidavits, &c.	0	13	4
	Ditto to defend	0	13	4
	Ditto for brief, or case for hearing	1	0	0
	If there are several witnesses and the brief is necessarily long an additional fee will be allowed.			
Representation, &c., and copies.	Drawing and engrossing representation, if ten folios or under	1	0	0
	If exceeding ten folios, for every additional folio	0	1	4
	Drawing and engrossing answer, reply, and other statements, if ten folios or under	1	0	0
	If exceeding ten folios, for every additional folio	0	1	4
	Copies of representation or other statements to file, at per folio	0	0	4
Special case.	Instructions	0	13	4
	Drawing special case for the Judge's opinion, including copy	1	0	0
	If exceeding ten folios, for every additional folio, including copy	0	1	4
Case on evidence.	For case to advise on evidence, including copy for counsel	1	0	0
Drawing instruments.	Drawing any instrument to be filed in or issued by the Registry for which no other fee is herein allowed, and for copy to be filed or issued:			

	£	s.	d.	
If five folios or under	0	6	8	
If above five folios, per folio	0	1	4	
For perusing and abstracting representation, answer, &c., and all other papers, and exhibits of all kinds, per folio:				Perusing and abstracting.
If five folios or under	0	5	0	
If above five folios, per folio	0	0	4	
For drawing same, per folio	0	1	0	Briefs and cases for hearing.
For each copy, per folio	0	0	4	
For maps or plans each from	1	1	0	Maps and plans.
	to			
	3	3	0	
Copies of same if required each from	0	10	0	
	to			
	1	0	0	
Drawing affidavits:				Affidavits.
If five folios or under, including copy	0	6	8	
If above five folios, per folio, including copy	0	1	4	
For every plain copy of any instrument, per folio:				Copies.
If five folios or under	0	2	6	
If above five folios, per folio	0	0	4	
If the same or any part thereof are required to be made *fac-simile*, for the part or parts copied *fac-simile*, in addition to the above, per folio	0	0	2	
For collating copy of any instrument with the original, or with another copy thereof, per folio, in addition to the fee for attendance:				Collating.
If five folios or under	0	2	6	
If above five folios, per folio	0	0	2	
All notices, if three folios or under, inclusive of copy and service	0	5	0	Notices.
If exceeding three folios, for every additional folio	0	1	0	
Drawing summons	0	3	4	Summonses.
Copy of summons or order of the Judge, and service	0	5	0	
Subpœna ad testificandum, including præcipe	0	5	0	Subpœna.
Subpœna duces tecum, if five folios or under, including præcipe	0	5	0	
If exceeding five folios, for each additional folio	0	1	0	
Service of subpœna, if within two miles of the place of business of the practitioner or of the person employed to effect the service	0	5	0	
If beyond that distance in addition for every mile one way	0	1	0	
Affidavit of service, if three folios or under	0	5	0	

		£	s.	d.
	If more than three folios, for every folio, including copy	0	1	4

In cases in which the person to be served shall avoid service, or the service shall be effected beyond the jurisdiction, except in Scotland and Ireland, such a sum to be allowed for service as the Registrar may consider reasonable under the circumstances.

		£	s.	d.
Attendances.	For attendance on and feeing counsel, when the fee is one guinea	0	6	8
	When the fee exceeds one guinea and is under five guineas	0	13	4
	When the fee is five guineas and upwards	1	0	0
	Attendance on consultation	0	13	4
	Attendance on conference	0	13	4
	Attendance in pursuance of notice to admit	0	6	8
	For every hour after the first	0	6	8
	On trial or hearing	2	2	0
	If it lasts the whole day	3	3	0
	For all attendances in chambers before the Judge	0	13	4
	All ordinary attendance before a Commissioner, on counsel, in the Registry, or upon the adverse parties or practitioner, for which no other fee is herein allowed	0	6	8
Term fees, letters, and messengers.	Term fee, letters, and messengers, for each term in which any business is done in Court or in chambers other than obtaining an order for taxation, or attending the taxation of bills of costs	0	15	0
	For every letter written to any person other than the practitioner's own client	0	3	6
Bills of costs.	Drawing bill of costs and copy for taxation, per folio	0	1	0
	Copy for the adverse party, per folio	0	0	4
	Attendance on taxation of bill of costs	0	13	4
	If above an hour, for each additional hour or part of an hour	0	6	8

If it should become necessary for Proctors or Solicitors to transact any business for which no fee is herein specified, such fee shall be allowed to them as would be allowed for similar business done in the Courts of Common Law and Equity.

Note.—All folios to consist of seventy-two words.

COSTS to be allowed PROCTORS or SOLICITORS for the use of other Persons.

Not to exceed as under:	£.	s.	d.
Upon a fee to counsel under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 guineas and under 20 guineas	0	10	0
20 guineas and under 30 guineas	0	15	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards—at per cent. on the fee paid	2	10	0
On consultations:			
Senior's clerk	0	7	6
Junior's clerk	0	2	6
On general retainer	0	10	6
On common retainer	0	2	6
On conference	0	5	0

Counsels' clerks' fees.

Allowance to witnesses, including their board and lodging, as between party and party:

Witnesses' expenses.

	£.	s.	d.
Common witnesses, such as labourers, journeymen, &c., &c.:			
If resident within five miles of the place of hearing, per diem	0	5	0
If beyond that distance, per diem	0	7	6
Master tradesmen, yeomen, farmers, &c.:			
If resident within five miles of the place of hearing, per diem	0	10	0
If resident beyond that distance, per diem	0	15	0
Auctioneers and accountants:			
If resident within five miles of the place of hearing, per diem	1	1	0
If resident beyond that distance, per diem	2	2	0
Professional men, including notaries, engineers, and surveyors, &c.:			
If resident within five miles of the place of hearing, per diem	1	1	0
If resident beyond that distance, per diem	3	3	0
Clerks to attorneys or others:			
If resident within five miles of the place of hearing, per diem	0	10	6
If resident beyond that distance, per diem	1	1	0

	£	s.	d.
Esquires, bankers, merchants, and gentlemen, per diem .	1	1	0
Females according to station in life :			
If resident within five miles of the place of hearing, per diem, from	0	5	0
		to	
	0	10	0
If resident beyond that distance, per diem, from .	0	7	6
		to	
	1	0	0
Police inspector :			
If resident within five miles of the place of hearing, per diem	0	7	6
If resident beyond that distance, per diem . .	0	10	0
Police constable :			
If resident within five miles of the place of hearing, per diem	0	5	0
If resident beyond that distance, per diem . .	0	7	6

The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid ; but in no case will there be an allowance for such expenses of more than 1*s.* per mile one way.

A. C. Cantuar.
Cairns, C.
W. Ebor.
J. London.
Penzance.
A. E. Cockburn.

CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

XXXIX VICTORIA.

THE M. MOXHAM. (7151.)

1875 Nov. 2.

Damage—Damage done to Pier situate in Country of a foreign State—Law of the Flag.

An English joint stock company, possessed of a pier at M., in Spain, instituted a cause of damage against an English steamship, which, it was alleged, had, by reason of the negligence of those in charge of her, come into collision with and damaged the pier. The owners of the steamship filed an answer, and therein alleged inter alia that the pier formed part of the land of Spain, and that by the law of Spain the master and mariners were alone answerable for the damage caused by the negligent navigation of the ship.

On motion to reject this portion of the answer:—

Held, that the law of Spain was not applicable to the circumstances of the case, and that so much of the answer as pleaded that law must be struck out.

Rev'd on appl.

THIS was a cause of damage instituted on behalf of the Marbella Iron Ore Co., Limited, against the English steamship *M. Moxham* and her freight in the sum of 2500*l.* The suit was

1875

THE M. MOXHAM.

brought for the recovery of damage sustained in consequence of the *M. Moxham* having come into collision with a pier possessed by the plaintiffs at Marbella, in Spain. An appearance was entered on behalf of the owners of the *M. Moxham* on the 21st of January, 1875, and the *M. Moxham* having been arrested in the suit, bail to answer judgment was put in in the sum of 1800*l.*

The petition, as amended, alleged in substance as follows:—

1. The plaintiffs are the Marbella Iron Ore Company, Limited, an English joint stock company established under the Companies Act, 1862 and the Acts incorporated therewith, for the purpose, among other things, of exporting ore from Marbella, in the country of Spain, to England and other places. The offices of the company are at No. 1, Crown Buildings, Queen Victoria Street, in the city of London. The plaintiffs were, at the time of the grievances hereinafter mentioned, possessed of a pier situate at Marbella aforesaid, for the purpose of shipping iron ore on board ships.

2. About 8.30 a.m. on the 5th day of October, 1874, the steamship *M. Moxham* came to Marbella for the purpose of loading iron ore from the said pier of the plaintiffs. There was scarcely any wind at the time, and the sea was perfectly smooth, and there was no current.

3. Those on board the *M. Moxham*, instead of keeping clear of the pier, as they could and might easily have done, so negligently navigated the said steamship that she approached and came into violent collision with the said pier and carried away the whole of the head of the said pier, causing enormous damage to it, and throwing several trucks laden with iron ore into the sea.

4. The aforesaid collision and the damages consequent thereon were occasioned by the negligence and improper navigation of those on board the *M. Moxham*.

On behalf of the defendants an answer was filed, which, as subsequently amended, after denying that the plaintiffs were possessed of the pier, and alleging in substance that the Court had no jurisdiction to entertain the suit, that the collision was not caused by the negligence of the *M. Moxham*, but was an inevitable accident, and that no injury would have happened to the pier if it had been in a sufficient state of repair, proceeded, in the 4th paragraph, substantially as follows:—

4. The defendants further say that the said alleged collision happened within the territory and jurisdiction of Spain, and that the said pier, at the time of the said collision, was annexed to and formed part of the land of Spain; and that if the said collision was occasioned by any negligence or improper navigation of those on board the *M. Moxham*, it was solely occasioned by the negligence of the master or mariners of the *M. Moxham*, and not by the defendants or any of them; and that by the law of Spain in force at the time and place of the said collision, the master and mariners of the ship, and not the ship or her owners, are liable in damages in respect of a collision occasioned as in the petition alleged;

and by such law neither the *M. Moxham*, nor the defendants, nor any of them, are or is liable in respect of the damages proceeded for in this cause.

On the 8th of July the solicitors for the plaintiffs gave notice that they should by counsel move the judge in Court for leave to strike out so much of the answer as alleged that the Court had no jurisdiction to entertain the suit, and also art. 4 of the said answer. An affidavit was brought in support of the motion in which one of the firm of solicitors retained for the plaintiffs alleged inter alia as follows:—

A few days after the collision the *M. Moxham* was arrested by process issuing out of the proper tribunal in Spain. At the time of the collision the *M. Moxham* was under charter, and upon the vessel being arrested, the defendants communicated with the plaintiffs with a view to procure the release of the ship, and thereupon, in order to obtain the said release, an agreement was made between the plaintiffs and defendants, and also between the plaintiffs and the captain of the *M. Moxham*, at his request and with the authority of the defendants, that the said vessel should be released and that the liability of the defendants for the alleged negligence of the ship should be determined by proceedings in the English courts. Upon the faith of these agreements the *M. Moxham* was released and was allowed to be loaded, and sailed for England for the benefit of the owners and charterers.

July 27. *Butt, Q.C.*, and *Benjamin, Q.C.* (*Johnstone* with them), on behalf of the plaintiffs, moved in the terms of the notice of motion. They argued in support of the jurisdiction of the Court, and referred to the following authorities: *Mostyn* v. *Fabrigas* (1); *Doulson* v. *Matthews* (2); 24 Vict. c. 10, s. 2; *The Uhla.* (3) (4)

Watkin Williams, Q.C., J. C. Mathew, and *E. C. Clarkson* appeared for the defendants, and on the counsel for the plaintiffs concluding their argument on the question of jurisdiction, stated to the Court that they were not prepared, in view of the agreement entered into at Marbella with respect to the release of the *M. Moxham*, to support the objection they had taken to the jurisdiction of the Court.

SIR ROBERT PHILLIMORE. The inclination of my mind, subject to any argument on the point I might have heard from the counsel of the defendants is, that the Court has jurisdiction over

(1) 1 Cowp. 161; 1 Sm. L. C. 658, 7th ed.

(2) 4 T. R. 503.

(3) Law Rep. 2 A. & E. 29, n.

(4) See also *The Merle*, 2 Asp. Mar. Law Cas. 402.

1875

THE M. MOXHAM.

the case. In these circumstances I shall treat the case not as coming before me by consent, but as one within the ordinary jurisdiction I possess to entertain suits arising out of collisions in foreign waters where no circumstance by which such jurisdiction might be ousted has been brought to my notice.

Butt, Q.C., and *Benjamin, Q.C.* The question of jurisdiction having been settled, the only point remaining to be argued is as to the admissibility of the 4th paragraph of the answer. Now the 4th paragraph sets up the law of Spain as the law by which the case is triable and in effect alleges that not the defendants—the owners of the ship doing damage—but other persons, are liable for the maritime tort in respect of which the suit is brought. It is submitted on the part of the plaintiffs that the lex fori, which is also the law of the flag, must govern the case, and that therefore all reference to the law of Spain, or any law other than English law, is clearly irrelevant. On this the case of *The Halley* (1) is the ruling authority, and is strictly in point with the present case. The plaintiffs also rely on the case of *Scott* v. *Seymour* (2), for although it may be said that the majority of the Court there only decided that in matters of procedure the lex fori was the law to be applied, yet the judgment of Wightman, J., certainly puts the question on higher grounds, holding that it would be wrong to apply the foreign law in a case between two British subjects where, if the lex fori were not to supply the governing rule, the plaintiff would be defrauded of a right recognised by the laws of England.

[SIR ROBERT PHILLIMORE referred to *Messina* v. *Petrococchino*. (3)]

The Central Criminal Court has within the last forty years taken cognizance of a charge of murder arising out of a duel fought at Boulogne, in France, and quite recently in *Reg.* v. *Anderson* (4), it has been distinctly laid down that crimes committed on board a British ship in a foreign navigable river are within the Admiralty criminal jurisdiction. The case of *The*

(1) Law Rep. 2 A. & E. 3; Law Rep. 2 P. C. 193.

(2) 1 H. & C. 219; 32 L. J. (Ex.) 61.

(3) Law Rep. 4 P. C. 144.

(4) Law Rep. 1 C. C. 161.

Halley (1) may really be taken to be an authority that where a maritime tort has been committed a shipowner is to be held in relation to the acts of the master, his servant, to be bound by the law of the flag. If, however, it be said that there is no actual decision that in cases of tort the law of the flag must govern, yet it cannot be denied, since the decision in *Lloyd* v. *Guibert* (2), that in cases of contract the rights conferred on the shipowner by the law of the flag are the only rights which can be recognised in the absence of any express stipulation to the contrary. If, then, we find that in criminal cases it has also been decided that the responsibilities of the master and crew of an English ship, even when within a foreign navigable river, are those imposed on them by the law of England: *Reg.* v. *Anderson* (3), surely the same considerations must apply in cases where a tort has been committed, and it must follow that the law of England, as the law of the flag, governs the rights and liabilities of the shipowner, whenever reparation at the suit of an English company is sought for damage committed by the master of an English ship within the jurisdiction of the Court of Admiralty.

Watkin Williams, Q.C., and *J. C. Mathew.* The defendants can only be held liable for an act which would be held wrongful by the law of the country in which it was committed. The case of *The Halley* (1) is the converse of the present case, and the decision there only lays down this proposition, that if a defendant is sued here for a tort committed abroad it is not enough to entitle the plaintiff to succeed that a liability according to foreign law should be proved, but that it is also necessary to shew that a liability recognised by English law was created by the commission of the act in question. Here the English law if applied, would not lessen the liabilities of the shipowner, but would create a new obligation unknown to the law of the place where the tort was committed. Indeed it is a mistake to suppose that the case of *The Halley* (1) affords any support to the contention that a defendant accused of a wrongful act before the Courts here is to be deprived of any benefit he might have gained by having his rights tried by the law of the country in which the act was done. In fact, the case

(1) Law Rep 2 A. & E. 3; Law Rep. 2 P. C. 193.

(2) 6 B. & S. 60; 33 L. J. (Q.B.) 241; Law Rep. 1 Q. B. 115.

(3) Law Rep 1 C. C. 161.

(2) 5 C 10 Jur N.S. 948

1875

THE M. MOXHAM.

if rightly examined is merely an illustration of the principle laid down in *Leroux* v. *Brown* (1) that the English law of procedure will restrict the rights of the party suing to those recognised by English law.

[SIR ROBERT PHILLIMORE referred to *Don* v. *Lippman.* (2)]

The defendants admit that in the present case the lex fori must be applied, but the lex fori in its turn adopts the law of the locality of the act, that is, Spanish law, as the law governing the substantial rights of the parties to the suit. This principle has been acted upon in cases where questions of the validity of Scotch or foreign marriages have come before the Courts.

[SIR ROBERT PHILLIMORE. In *Dalrymple* v. *Dalrymple* (3) Lord Stowell said, "Here the law of England withdraws altogether and leaves the legal question to the exclusive judgment of the law of Scotland." In cases, however, of incestuous marriages and others where an attempt has been made to rely on principles which are contrary to natural justice, it has been held that the foreign law ought not to be adopted in our Courts. (4)]

It cannot be that the plaintiffs by choosing to proceed in this country can convert into an actionable wrong an act for the consequences of which the defendants would not be liable by the law of Spain. The true principle is laid down in *Phillips* v. *Eyre.* (5) "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done:" *Phillips* v. *Eyre.* (6) The case of *Dobree* v. *Napier* (7), is also an authority that the defendants, not being liable by the Spanish law, cannot be held liable here. The defendants have relied on *Lloyd* v. *Guibert* (8) and *Reg.* v. *Anderson* (9), but the Court of Exchequer Chamber in deciding that in

(1) 12 C. B. 801; 22 L. J. (C.P.) 1.
(2) 5 Cl. & F. 1.
(3) 2 Hagg. Cons. at p. 59.
(4) See *Hyde* v. *Hyde*, Law Rep. 1 P. & M. 130. 12 Jur. N.S. 414.
(5) Law Rep. 6 Q. B. 1.
(6) Law Rep. 6 Q. B. at p. 28; see also notes to *Mostyn* v. *Fabrigas*, 1 Sm. L. C. 658, 7th ed.
(7) 2 Bing. N. C. 781.
(8) 6 B. & S. 60; 33 L. J. (Q.B.) 241; Law Rep. 1 Q. B. 115. 10 Jur. N.S. 962
(9) Law Rep. 1 C. C. R. 161.

Lloyd v. *Guibert* (1) the governing law was the law of the flag, only found that it was the intention of the parties to be bound by that law, whilst in *Reg.* v. *Anderson* (2) the act done was unlawful by that law by which, in other respects, the crew of the ship had agreed to be bound. Moreover, *Reg.* v. *Anderson* (2) is not so analogous to the present case as *Reg.* v. *Lesly* (3), where an impressment in Chili on board a British ship, lawful there, was held by Erle, C.J., and the Court for Crown Cases Reserved to be no ground for an indictment here: *Phillips* v. *Eyre.* (4)

[SIR ROBERT PHILLIMORE. Have you considered what would be involved in the proposition that the ship proceeded against in this case was part of the territory of England?]

If it was held as a consequence that the law of the flag must govern, the liability in each case would inconveniently vary according to the nationality of the ship doing damage. It is true the parties here are British subjects, but the plaintiffs owe temporary allegiance to Spain, and with respect to the wrong they have committed are amenable to Spanish law. [They referred to *General Steam Co.* v. *Guillou.* (5)]

Benjamin, Q.C., in reply. The cause of action, in respect of which the plaintiffs are proceeding, is the negligent navigation of an English ship: *The Industrie* (6), whilst the injury done to the pier is merely a consequence of such negligent navigation. This being so, it must be admitted, as the wrongful act was done upon the water within the jurisdiction of this Court and in an English ship, that the liabilities arising from the commission of the act must be those imposed by English law.

July 29. THE COURT directed that the fourth article should be reformed, and announced that it would deliver a reasoned judgment after the vacation.

Cur. adv. vult.

Nov. 2. SIR ROBERT PHILLIMORE. In this case a suit has been instituted on behalf of an English joint stock company who

(1) 6 B. & S. 60; 33 L. J. (Q.B.) 241; Law Rep. 1 Q. B. 115. 10 Jur N.S. 947.
(2) Law Rep. 1 C. C. 161.
(3) Bell's Cr. C. 220; 29 L. J. (M.C.) 97. 6 Jur N.S. 202.
(4) Law Rep. 6 Q. B. at p. 29.
(5) 11 M. & W. 877.
(6) Law Rep. 3 A. & E. 303.

BIBL. LONDIN UNIV.

1875

THE M. MOXHAM.

are possessed of a pier at Marbella, in Spain, against the steamship *M. Moxham*. The petition alleges that the negligent navigation of the steamship brought her into collision with the pier and caused great damage to it. The answer denies the negligent navigation, and says that the damage was the result of inevitable accident or of the insufficient state of the pier, and further pleads in the 4th article, according to the amendment proposed and accepted at the hearing, as follows [His Lordship here read the 4th article as above set out].

The article has been objected to on the ground that the law of Spain does not govern the question which is to be decided according to the law of England; and the objection to the jurisdiction pleaded in the former article of the answer having been withdrawn, the only question I have now to determine is, whether the law of Spain or the law of England is to be applied to the circumstances of the case. The damage of which complaint is made must be taken to have been inflicted by a British merchant vessel while in waters subject to the Admiralty jurisdiction within the ebb and flow of the tide upon a pier in the territory of Spain. The act of injury, therefore, was done from the merchant vessel at sea, though the object injured was situate on the land. The defendants contend that in the circumstances this Court must apply the local law which, as they allege, exempts the ship from liability, and neither the lex fori nor the law of the flag under which the ship, if improperly navigated, would be liable for the damage. Various cases were cited in support of this proposition. Among them *Dobree* v. *Napier* (1) and *Phillips* v. *Eyre* (2), as decided in the Queen's Bench and in the Exchequer Chamber; but the latter of these cases was in great measure dependent upon peculiar circumstances and upon the powers of a colonial legislature as recognised by the law of the empire; and in the former case the alleged tort arose out of an act of an officer of a foreign state acting, as the Court held, lawfully in the seizure on the high seas of a vessel breaking the blockade, and, therefore committing no trespass. Both cases moreover turning upon acts of state, afford no safe analogy upon which the Court could rely. Upon behalf

(1) 2 Bing. N. C. 781. (2) Law Rep. 4 Q. B. 225; 6 Q. B. 1.

of the plaintiff three cases were especially relied upon: *Reg.* v. *Anderson* (1); *Lloyd* v. *Guibert* (2); and *The Halley.* (3) In the first case, which related to a charge of manslaughter committed on board an English vessel within a French river where the tide ebbed and flowed, Bovill, C.J., said, "There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which that nation might enforce if they thought fit; but at the same time he was also within a British merchant vessel, on board that vessel as a part of the crew, and, as such, he must be taken to have been under the protection of the British law and also amenable to its provisions." And in this view the other judges seem to have concurred. It seems hardly necessary to refer to other cases, but I would observe that the case of *Lloyd* v. *Guibert* (2) establishes that, in a case of contract, the responsibility of the owner of a vessel for the acts of his servants is governed by the law of the flag. With regard to *The Halley* (3), I think it unnecessary to enter into an examination of that case, the decision in which is of more indirect application; but I agree with the counsel for the plaintiffs that it points in the same direction. Upon the whole, I am satisfied, both upon principle and upon the authority of precedents, that the Spanish law is not applicable to the present case, and that the 4th article must be reformed by striking out all that portion which pleads the Spanish law, that is, all the words after the words "the land of Spain."

Solicitors for plaintiffs: *C. C. Ellis & Co.*
Solicitors for defendants: *Parker & Clarke.*

(1) Law Rep. 1 C. C. 161. (2) Law Rep. 1 Q. B. 115.
(3) Law Rep. 2 P. C. 193.

1875
Nov. 16.

THE TWO BROTHERS. (B. No. 37.)

Practice—Appeal from County Court—31 & 32 *Vict. c.* 71, *s.* 27—*Supreme Court of Judicature Act*, 1873, *ss.* 34, 42.

The 27th section of the County Courts Admiralty Jurisdiction Act, 1868, provides that the judge of the High Court of Admiralty may, on sufficient cause being shewn to his satisfaction, allow an appeal from a final decree or order of a county court in an Admiralty cause to be prosecuted, notwithstanding that the instrument of appeal has not been lodged in the Registry of the High Court of Admiralty within ten days from the date of the decree or order appealed from :—

Held, that an application for leave to appeal under this section was rightly made to the judge of the High Court of Admiralty sitting as a judge of the High Court of Justice.

Nov. 8. *W. G. F. Phillimore*, on behalf of the owners of the *Two Brothers*, applied to the Court ex parte for leave to appeal from a decree pronounced in an Admiralty cause by the judge of the county court of Yorkshire, on the 25th of October last, and for directions as to the manner in which the appeal, if granted, should be proceeded with. He stated that the owners of the *Two Brothers* had within ten days from the date of the decree tendered to the registrar of the county court security for the costs of the appeal, but that the registrar had declined to accept such security. The Court directed the motion to stand over in order that notice might be served on the respondents.

Nov. 9. *Phillimore* renewed the application. The 27th section of the County Courts Admiralty Jurisdiction Act, 1868, conferring on the judge of the Court of Admiralty exclusively the power of extending the time for appealing in County Courts Admiralty suits is still in force, and its effect is in no wise altered by any of the provisions of the Supreme Court of Judicature Act, 1873. Indeed, by the 42nd section of that Act, all causes and matters within the exclusive cognizance of the High Court of Admiralty are expressly assigned to the present judge of the said Court so long as he remains a judge of the High Court. It is submitted that there is nothing, so far as an interlocutory application like the present is concerned, to clash with these provisions; for even if s. 45, directing that appeals from county courts

may be heard and determined by a Divisional Court, does include the final determining of county court appeals in Admiralty suits, yet it is submitted that, under s. 34, such appeals must be assigned to the Probate Division and Admiralty Division; and by virtue of s. 42, the judge of the Court of Admiralty, whose title is preserved by s. 11 of the Act, must be one of the members constituting the Divisional Court before whom the determination of such appeals would take place. Further, the 76th section preserves the appellate jurisdiction formerly vested in this Court, and this application is properly made on motion under the general provisions of the rules of Court contained in the first schedule of the Supreme Court of Judicature Act, 1875, Order I., Rule 3, Order LIII., Rule 1.

E. C. Clarkson, on behalf of the respondents. The words, "All causes and matters" in that part of the 34th section of the Supreme Court of Judicature Act, 1873, which relates to the Probate, Divorce, and Admiralty Division, can only mean all original causes and matters, and do not apply to appeals from county courts in Admiralty suits. The 45th section is imperative, and requires that county courts appeals in Admiralty suits should be heard and determined by a Divisional Court, and the effect of the section is to give the Divisional Court all the powers of an Appellate Court in regard to such appeals; this Court, therefore, can have no power to make the order applied for by the appellants.

Phillimore, in reply. It is clear that under s. 34 appeals from county courts are included, for when the legislature intended to except county courts appeals from the assignment of business to the Chancery Division, the exception is expressly made.

Cur. adv. vult.

Nov. 16. SIR ROBERT PHILLIMORE. This is an application for leave to appeal from a decision of the county court of Yorkshire, the time prescribed by the statute having elapsed. Two questions are raised—one as to whether the application be such as the Court ought, in the exercise of its discretion under the County Court Admiralty Jurisdiction Act, 1868, to grant; the other, as

1875

THE TWO BROTHERS.

to whether, having regard to the provisions of the Judicature Acts, the application be rightly made to this Court.

First, I am of opinion that if I have the power, I ought, in accordance with the spirit of former decisions on the subject, to grant the application.

The second question is more difficult to determine. The 34th section of the Supreme Court of Judicature Act, 1873, relates to the assignment of certain business to the Divisions of the High Court, and as to the Chancery Division, provides: There shall be "assigned (subject as aforesaid) to the Chancery Division of the said Court. . . . 2. All causes and matters to be commenced after the commencement of the Act under any Act of Parliament by which exclusive jurisdiction in respect to such causes or matters has been given to the Court of Chancery or to any judges or judge thereof respectively, except appeals from county courts." These words of exception as to appeal seem to intimate that where they are not used, appeals from county courts are included as in the category of causes and matters to be assigned. The 2nd paragraph as to assignment to the Probate, Divorce, and Admiralty Division provides that these shall be assigned to the Probate, Divorce, and Admiralty Division of the said High Court: "All causes and matters which would have been within the exclusive cognizance of the Court of Probate or the Court for Divorce and Matrimonial Causes or of the High Court of Admiralty, if this Act had not passed." At the end of s. 42 it is provided that, subject to certain exceptions, "all causes and matters which if this Act had not passed would have been within the exclusive cognizance of the High Court of Admiralty, shall be assigned to the present judge of the said Admiralty Court during his continuance in office as a judge of the High Court." I am of opinion that the present application relates to a cause or matter which has hitherto been within the exclusive jurisdiction of the present judge of the High Court of Admiralty. The acts which gave, within certain limits, jurisdiction in Admiralty matters to the county courts confined the appeal from the decisions of such Courts in Admiralty causes to this court. There can be no reasonable doubt, I think, that if there was no other enactment in this

statute as to county courts, that the present application would have been rightly made. But reliance is placed by the counsel who opposes the application on the 45th section, which is as follows: "All appeals from petty or quarter sessions, from a county court, or from any other inferior court which might, before the passing of this Act, be brought to any court or judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the said High Court of Justice, consisting respectively of such of the judges thereof as may from time to time be assigned for that purpose, pursuant to rules of Court, or (subject to rules of Court) as may be so assigned, according to arrangements made for the purpose by the judges of the said High Court."

After much consideration I have arrived at the conclusion that it could not have been the intention of the legislature to limit the powers already granted by the 42nd section to the present judge of the High Court of Admiralty, and that the 45th section must be construed so as to be in harmony with the 42nd section. I should mention, also, that the last County Court Act (38 & 39 Vict. c. 50), which was passed in the same session, though a little later than the Supreme Court of Judicature Act, 1875, and which came into operation a day later, viz., on the 2nd of November last, contemplates the High Court of Admiralty as the only court of appeal from the Admiralty jurisdiction of the county courts.

Having arrived at this conclusion, I thought it, nevertheless, my duty to confer with Sir James Hannen upon the construction of the Act. He has given careful attention to the subject, and, while he thinks the question is not free from doubt, expresses his opinion to me in language which I am allowed to cite:—

"My impression is, that the effect of the 34th and 42nd sections of the Judicature Act, 1873, is that you bring with you into the High Court all the jurisdiction and powers, including that of hearing appeals from county courts, which you formerly possessed as judge of the Court of Admiralty; and that the effect of the 45th section is not to take away or limit any of those powers, but that it is merely permissive and prospective, and that until rules of Court or arrangements be made by the judges of the High

1875

THE TWO BROTHERS.

Court for the purpose of holding Divisional Courts for the hearing of appeals from county courts, &c., your jurisdiction remains unaffected."

Fortified by this agreement with my opinion, I decide that this application is rightly made, and I grant it. (1)

Solicitors for appellants: *Waddilove & Nutt.*
Solicitors for respondents: *Pritchard & Son.*

Dec. 21.

OUSEY *v.* OUSEY AND ATKINSON.

Suit for Dissolution of Marriage—Decree Nisi—Application to make the Decree absolute on behalf of Respondent—Right to have Petition dismissed for Non-prosecution.

A petition having been presented for a dissolution of marriage on the ground of the adultery of the wife, and a decree nisi made thereon, the petitioner failed to apply to the Court within reasonable time to have such decree made absolute. On an application to that effect on behalf of the respondent:—

Held, that the power of the Court in dissolving marriages can only be exercised on the application of an innocent party.

As the application for a decree absolute is a material step in the cause, if the petitioner fails to take it within reasonable time, it would seem that the respondent may call upon him to do so, or shew cause why the decree nisi should not be revoked and the petition be dismissed for want of prosecution.

THE parties in this case were married in December, 1868, and separated on the 29th of May, 1869, without having consummated the marriage. In 1872, under the impression that her first marriage was invalid, the respondent married the co-respondent in Scotland. The husband petitioned this Court for a dissolution of his marriage by reason of the adultery of his wife, who in her answer alleged that the petitioner had separated from her without reasonable cause, and had deserted her, and had thereby been guilty of wilful neglect and misconduct conducing to the adultery. The petition came before the Judge Ordinary on the 30th of April, 1874, when he decided that the petitioner had acted under

(1) The Court intimated that security for the costs of the appeal should be given in the county court, and that the registrar should accept such security.

a bonâ fide belief that the respondent had wronged him, and had not been guilty of such desertion or wilful separation as to deprive him of his right to a decree, and he accordingly made a decree nisi. (1) Six months having elapsed, and no steps having been taken on behalf of the petitioner to make the decree absolute,

June 22. *Inderwick, Q.C.*, on the part of the respondent, moved to that effect. The decree nisi as between the parties was final, and it is fair that the respondent should have her status determined. Again, an appeal will lie only on a final decree, and to give the respondent an opportunity to enter such an appeal, she has a right to ask, on the failure of the petitioner to do so within reasonable time, that the decree nisi be made absolute: *Mordaunt* v. *Mordaunt.* (2)

Cur. adv. vult.

July 6. THE JUDGE ORDINARY. The question raised in this case is of so much importance that I cannot dispose of it without argument. I shall therefore refer the matter to the Queen's Proctor under the provisions of 23 & 24 Vict. c. 144, s. 5.

Nov. 30. The case came on for further argument.

Inderwick, Q.C., for the respondent. The decree nisi is a final decree between the parties; the suspension of it is merely to enable inquiries to be made as to the bona fides of the parties. The decree nisi in form dissolves the marriage, unless sufficient reason be shewn within a limited time why the Court should hold its hand. If no affidavits be filed within the time, and no cause shewn to the contrary, the drawing up of the decree absolute might be done in the registry as a mere ministerial act. At any rate there is nothing in the statute or rules which requires that the decree shall be made absolute at the application of the petitioner, although he usually makes it. In other courts, where an order has been once made, either party may apply to have it drawn up: 2 Chitty's Practice, 12th ed. p. 1575. Again, if the respondent cannot obtain what she now asks, she may be prevented from exercising her right to appeal, for she cannot appeal

(1) Law Rep. 3 P. & M. 223. (2) Law Rep. 2 P. & M. 382.

1875

OUSEY v. OUSEY.

except from a final decision: *Mordaunt* v. *Mordaunt.* (1) Lastly, she has a right to have her status determined if possible, and it is impossible to say what her status is after a decree nisi and before it has been made absolute.

THE JUDGE ORDINARY. A remedy for that would be that she should apply to have the petition dismissed, by reason that her husband had instituted proceedings which he had no intention of completing.

[The cases cited were *Latham* v. *Latham* (2); *Boulton* v. *Boulton* (3); *Stoate* v. *Stoate* (4); *Prole* v. *Soady.* (5)]

Dr. Deane, Q.C., and *Cowie,* for the Queen's Proctor. The statutes 20 & 21 Vict. c. 85, s. 31, and 23 & 24 Vict. c. 144, s. 7, and rule 80, leave this question entirely at large; no person is mentioned therein on whose application the final decree may be made; at the same time, it is not said that *any person* may make such an application as in rule 74 in reference to shewing cause against a decree. The statute was passed to give relief to both parties to the marriage, both the innocent and the guilty; but if the petitioner, having obtained a decree nisi, is not willing to support it, it cannot be made absolute, or be reversed by the efflux of time, and the respondent is placed in a difficulty, to remedy which there is no provision, for it has been held that a petition cannot be dismissed after a decree nisi, except for the grounds contemplated by the statutes: *Lewis* v. *Lewis.* (6) It is in the power of the petitioner, according to the practice, at the last moment to vary the prayer of his petition, either by reason of failure of evidence or for some personal motive: *Mycock* v. *Mycock* (7), and to obtain merely a judicial separation when in the first instance he had asked for a dissolution of marriage; for the same reason, may not the present petitioner say he is satisfied to have obtained a decree which relieves him from the maintenance of the respondent and precludes a suit for restitution of conjugal rights, and decline to go further and ask for a decree absolute? Under 29

(1) Law Rep. 2 P. & M. 382.

(2) 2 Sw. & Tr. 299; 30 L. J. (P. M. & A.) 163. 7 Jur N.S. 218.

(3) 2 Sw. & Tr. 405; 31 L. J. (P. M. & A.) 27.

(4) 2 Sw. & Tr. 384; 30 L. J. (P. M. & A.) 173.

(5) Law Rep. 3 Ch. 220.

(6) 2 Sw. & Tr. 394; 30 L. J. (P. M. & A.) 199.

(7) Law Rep. 2 P. & M. 98.

Vict. c. 32, s. 2, the respondent in this case might have applied for, and, if she had proved her defence successfully, might have obtained, a sentence of judicial separation against the petitioner; ought she to obtain greater relief against him, although unsuccessful at the trial? It has been decided by the cases, *Latham* v. *Latham* (1) and *Stoate* v. *Stoate* (2), that the lis between the petitioner and respondent is over after the decree nisi, and the respondent cannot shew cause against the decree being made absolute. If so, the respondent has no locus standi in this Court at the present moment, and her application ought not to be acceded to. As regards the argument that the respondent may be deprived of her right of appeal as the decree nisi is final between the parties, it is quite possible that she might institute such an appeal though the decree has not been made absolute. [The cases referred to were *Lewis* v. *Lewis* (3), *Wells* v. *Wells* (4), and *Hulse* v. *Hulse* (*Queen's Proctor intervening*). (5)]

Cur. adv. vult.

Dec. 21. THE JUDGE ORDINARY (President). This was a suit by a husband for dissolution of his marriage with the respondent on the ground of her adultery. The respondent and co-respondent pleaded a denial, and the respondent also pleaded certain counter-charges against the petitioner. I found that the charge was proved, and that the counter-charges were not proved, and I accordingly pronounced a decree nisi. Six months having elapsed, and no cause having been shewn against the decree, the petitioner became entitled to have it made absolute upon application by him to the Court for that purpose, but he has abstained from making such an application. In this state of circumstances the respondent applied to the Court to make the decree absolute. The petitioner had notice of the motion, but did not appear. Having regard to the general importance of the question involved, I thought it a case in which I ought to avail myself of the power given me by the 5th section of the statute 23 & 24 Vict. c. 144, and to have the matter fully argued before me by counsel in-

(1) 2 Sw. & Tr. 299; 30 L. J. (P. M. & A.) 163. 7 Jur. N.S. 218

(2) 2 Sw. & Tr. 384; 30 L. J. (P. M. & A.) 173.

(3) 2 Sw. & Tr. 394; 30 L. J. (P. M. & A.) 199. 7 Jur. N.S. 831.

(4) 3 Sw. & Tr. 542; 33 L. J. (P. M. & A.) 151.

(5) Law Rep. 2 P. & M. 259.

1875

OUSEY v. OUSEY.

structed by the Queen's Proctor. The powers of the Court in suits for the dissolution of marriage are exclusively derived from the statute 20 & 21 Vict. c. 85 and the subsequent amending Acts. Turning, then, to those statutes, we find that by the 31st section of 20 & 21 Vict. c. 85 it is enacted that if the Court shall be satisfied that the case of the petitioner has been proved, and shall not find that the petitioner has condoned the adultery, or been guilty of connivance or collusion, it shall pronounce a decree declaring such marriage to be dissolved. The power of pronouncing an immediate decree of dissolution is taken away by the 23 & 24 Vict. c. 144, s. 7, by which it is enacted that every decree for a divorce shall be in the first instance a decree nisi not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the Court shall direct. And during that period any person shall be at liberty to shew cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court. The 80th rule of Court provides that all applications to make absolute a decree nisi for dissolution of a marriage must be made to the Court by motion. This motion, therefore, is a necessary step in the cause for the purpose of obtaining a decree of dissolution, and the question is, whether it can be taken by the party proceeded against. It has been held that the party against whom the decree nisi has been obtained cannot be heard to shew cause why it should not be made absolute: *Stoate* v. *Stoate* (1); and that the lis as between the parties is put an end to by the decree nisi: *Latham* v. *Latham*. (2) Upon this an argument against the respondent in this case was based, that she had no locus standi to be heard at all, but I am of opinion that she has. The language of Sir C. Cresswell in *Latham* v. *Latham* (2) must be taken with reference to the matter then under consideration, namely, alimony pendente lite. That learned judge held that such alimony ceased upon the decree nisi being pronounced, but it is clear that he did not intend to decide that the respondent had no right to be heard at all after the decree nisi, because he did in fact hear her counsel on the question of what amount of

(1) 2 Sw. & Tr. 384; 30 L. J. (P. M. & A.) 173.

(2) 2 Sw. & Tr. 299; 30 L. J. (P. M. & A.) 163.

alimony was due, and refused to make the decree absolute until it was paid. There are, indeed, many subjects on which the respondent against whom a decree nisi has been pronounced is entitled to be heard. It will be sufficient to specify one. By the 32nd section of the statute 20 & 21 Vict. c. 85 this Court is empowered, if it shall think fit, on any such decree (that is, a decree declaring the marriage to be dissolved), to order that the husband shall secure to the wife such gross sum, or annual sum of money, as having regard to her fortune, if any, to the ability of the husband, and to the conduct of the parties, it shall deem reasonable. Although this power is rarely exercised in favour of a guilty wife, yet, as, under special circumstances, it may be, it is clear that she must have the right of being heard to shew that such special circumstances exist,—as, for example, that she brought her husband a large fortune, and that without such allowance she will be destitute,—I have selected this example of the cases in which a respondent, against whom a decree nisi has been pronounced, is entitled to be heard, because it may be thought to have a bearing on the question now under consideration.

The order for an allowance to the wife, to be made under the above 32nd section, must be embodied in or be contemporaneous with the decree absolute: *Sidney* v. *Sidney.* (1) It cannot be made before, and, as it was held in *Latham* v. *Latham* (2) that the alimony pendente lite ceased with the decree nisi, this case may be thought to afford an argument in support of the contention that a husband who has obtained a decree nisi against his wife ought not to be permitted to hold the decree perpetually suspended over her, thus leaving her without means and depriving the Court of the power of compelling him to provide them. The answer to this argument appears to me to be, that the legislature has only conferred upon this Court the power of compelling the husband to make an allowance to the guilty wife, by way of condition, upon his accepting the benefit of a dissolution of the marriage. It cannot be legitimately inferred from this that it was intended that the wife should be able to insist on her husband's accepting the benefit.

(1) 36 L. J. (P. & M.) 73.
(2) 2 Sw. & Tr. 299; 30 L. J. (P. M. & A.) 163.

1875

OUSEY
v.
OUSEY.

The argument chiefly relied upon in support of the application was derived from the 3rd section of 31 & 32 Vict. c. 77, by which it is enacted that every person dissatisfied with the final decision of the Court on any petition for dissolution of marriage may, within one calendar month after the pronouncing thereof, appeal therefrom to the House of Lords. It was urged that, unless the decree were now made absolute at the instance of the wife, it would be impossible for her to appeal from the decision of the Court if she were so minded. It was not suggested that she had any intention of doing so, but it was contended that a respondent, having good grounds for dissatisfaction with the decision arrived at on the decree nisi, would be in effect deprived of the right of appeal if the Court should refuse to make a decree absolute, unless it was asked for by the petitioner, who might abstain from applying for it from an expectation that the decree would on appeal be reversed. To this it was answered that the final decision, mentioned in the 3rd section of 31 & 32 Vict. c. 77, was not the decree absolute, but the decree nisi. There is reason to think that it would be well if this construction of the section could be supported, but I am of opinion that it cannot. The appeal given by the repealed section (the 56th) of 20 & 21 Vict. c. 85 was undoubtedly from the decree dissolving the marriage, for there was then no other, and it appears from the proviso in the 3rd section of 31 & 32 Vict. c. 77, that that was the decree which the legislature had in view in that section, for it enacts that in suits for dissolution of marriage no respondent or co-respondent not appearing and defending the suit on the occasion of the decree nisi being made, shall have any right of appeal to the House of Lords against the decree when made absolute, unless the Court, upon application made at the time of pronouncing of the decree absolute, shall see fit to permit an appeal. It would not, I think, be a reasonable construction of the section to hold that it allows an appeal in some cases from the decree nisi, and in others from the decree absolute. Further, by the 4th section of the same statute it is enacted that in cases where, under the Act, there shall be no right of appeal (that is, where the respondent or co-respondent has not appeared and defended the suit on the occasion of the decree nisi) the parties respectively shall be at liberty to marry

9 L.R. D 360

again at any time after the pronouncing the decree absolute, thus implying that where there is a right of appeal the parties must, before marrying again, wait, as required by the 57th section of the statute 20 & 21 Vict. c. 85, until the time limited for appealing against the decree dissolving the marriage (i.e., the decree absolute) has expired. This is altogether inconsistent with the idea that the appeal ought to have been from the decree nisi. But the fact that the appeal is from the decree absolute, affords the answer to the argument founded on the supposed hardship of the respondent being deprived of the right of appeal. The legislature regards the decree dissolving the marriage alone as the subject of an appeal. That is the presumed object of the proceedings, and it is that which the respondent is presumed to be opposing, although, no doubt, as a matter of fact, the decision arrived at on pronouncing the decree nisi is looked at by the respondent in many, if not a majority, of cases, as the more important, since it determines the question of her guilt. Until it is pronounced, there has not arisen in contemplation of law any ground of complaint.

There is, however, one paramount reason specially applicable to proceedings for a dissolution of marriage, which leads me, although reluctantly, to the conclusion that I must refuse this application, and it is this: that it appears from the several Acts relating to the Divorce Court, that the dissolution of a marriage is to be granted only on the petition of a person who comes within the description repeatedly used in the Acts of an innocent party, and solely as a relief to such a person on proof of adultery committed by the opposite party, with or without other offences, according to the sex of the accused. That this is the case under the Act of 1857 appears to me obvious. There was then no decree nisi; how, then, could a respondent ask for a decree dissolving the marriage, there being no charge against the petitioner on which a claim against him to have the marriage dissolved could be based? The only course which would then have been open to the respondent would have been to ask that the petition should be dismissed for want of prosecution. The subsequent legislation, by which the decree of dissolution was divided into two parts, was not intended to give the respondent any greater advantage, or in any way to alter her position, but to give time for the Queen's Proctor

1875

OUSEY v. OUSEY.

and other parties to bring to the knowledge of the Court any facts which would deprive the petitioner of his inchoate right to have the decree made absolute.

This principle, that the powers of the Court are to be exercised only on behalf of the innocent, is remarkably illustrated by the case of *Hulse* v. *Hulse* (*Queen's Proctor intervening*) (1), where the Court refused to make a decree absolute on the ground that the petitioner had been guilty of adultery after the decree nisi. If, then, I were to make this decree absolute at the instance of the respondent, I should in effect be giving relief not to the innocent, but to the guilty, and upon the ground of her own guilt. To make more manifest the anomaly of such a proceeding, let it be supposed that the respondent is entitled, as the case now stands, to succeed, but that it could be shewn by the Queen's Proctor that the petitioner had been guilty of adultery since the time expired for making the decree absolute, the respondent would be in this position: she was entitled to have her marriage dissolved on the ground of her own adultery, and she might be deprived of this right by the guilt of her husband. Having regard to these consequences, and for the reasons I have given, I am constrained to hold that the respondent is not entitled to succeed on her present application. Her position is one of hardship, for which, it may be, the law does not afford a remedy; but I think it right to point out that it is not to be assumed as clear that this suit must for ever remain in its present position. I am inclined to think that this is not the case, although, as the point is not before me judicially, I do not express a positive opinion upon it. By the present law, practice, and rules, as I construe them, the petitioner in a divorce suit can alone apply to have the decree made absolute. This, therefore, is a step in the cause. If by not taking it he subjects the respondent to any disadvantage, I can see no reason, as at present advised, why she should not call upon him either to take that step or to have the decree nisi revoked and his petition dismissed for want of prosecution. It is to be observed that this is all she could get in the event of a successful appeal; and, therefore, although it may not be the relief she desires in this case, it would do away with the theo-

(1) Law Rep. 2 P. & M. 259.

retical hardship she now complains of on behalf of others of not being able to appeal. It would not, indeed, enable the Court, if this were a proper case for doing so, to compel the petitioner to secure some allowance to his wife, because, as I have pointed out, the legislature has only enabled the Court to exercise that power by way of condition upon the petitioner accepting the benefit of a dissolution of marriage; but, on the other hand, her legal position in that respect would not be worse than if her husband had not instituted any proceedings against her. In making these suggestions I have not overlooked the case of *Lewis* v. *Lewis* (1), in which Sir C. Cresswell expressed a doubt whether, after a decree nisi, this Court has power to dismiss the petition at the instance of either of the parties to the suit, or in any other manner than upon the intervention of the Queen's Proctor, or of a third person. But as that learned judge did not decide the point, I should feel at liberty to act upon my own opinion, if, after argument, I should still retain it, that the Court had power in that case to revoke the decree nisi and dismiss the petition.

Solicitors for respondent: *Rowley, Page, & Rowley.*

HUDSON *v.* HUDSON AND POOLE.

Dec. 21.

Matrimonial Suit—Decree Nisi—Intervention of Queen's Proctor—No Charge of Collusion—Practice.

If information be given to the Queen's Proctor of material facts necessary to the due decision of a case before the Court during the progress of the cause, he cannot at that time take any steps except to watch the case and see whether such material facts are brought to the notice of the Court. If not, he will be entitled, as one of the public, but acting under the direction of the Attorney General, to shew cause against the decree being made absolute, in which case he will follow the ordinary practice prescribed by the rules. It is only when he has evidence of collusion that it is necessary that he should apply to the Court for leave to intervene under the latter part of the 7th section of the statute 23 & 24 Vict. c. 144.

THIS was originally a suit for dissolution of marriage by reason of the adultery of the respondent, in which, on the 11th of May,

(1) 2 Sw. & Tr. 394; 30 L. J. (P. M. & A.) 199. 7 Jur N S 831.

1875

HUDSON v. HUDSON.

1875, a decree nisi was pronounced. Subsequently, information was given to the Queen's Proctor that, at the hearing of the cause, material facts had been withheld from the knowledge of the Court, namely, that the petitioner had himself been guilty of cruelty and adultery. The Queen's Proctor, acting under the direction of the Attorney General, instructed counsel to apply to the Court for leave to intervene in the suit; but as it was not alleged by him that the decree nisi was obtained by collusion between the parties, it was objected that such leave was unnecessary, and that he ought to file affidavits under the earlier part of the 7th section of 23 & 24 Vict. c. 144. Thereupon the motion stood over for argument.

Dec. 14. *Cowie* appeared for the Queen's Proctor, and moved the Court either to grant him leave to intervene in the usual manner, or to make such special order as it should seem fit as to the mode in which the Queen's Proctor should shew cause against the decree nisi being made absolute. The 7th section (23 & 24 Vict. c. 144) was divided into two parts. The first authorized any person after the decree nisi to shew cause why the decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the Court; and by the 70th and subsequent rules, such person must enter an appearance and file affidavits setting forth the facts upon which he relies. This part of the section has no reference to the Queen's Proctor; the latter part has, and is subdivided into two heads: by the first, at any time during the progress of the cause, or before the decree is made absolute, any person may give information to the Queen's Proctor of any matter material to the due decision of the case, who may take such steps as the Attorney General may deem necessary; and in case the Queen's Proctor suspects collusion, he may, under the directions of the Attorney General and by leave of the Court, intervene in the suit. He admitted that up to the present time the Queen's Proctor had invariably alleged collusion; but it is obvious that, under the first part of the second division of the section, the Queen's Proctor has a right to intervene on other grounds than that, and if so, he rightly intervenes in his character as Queen's Proctor; but the rules 68 and 69, as to the intervention of the

Queen's Proctor, and rules 70 to 76, as to shewing cause against a decree, are not applicable to him acting under that part of the section. If he was not correct in applying to the Court for leave to intervene, he would ask that some special order should be made to regulate the matter.

Dr. Swabey, for the petitioner. This point has arisen in consequence of the attention of the Court having been called to the practice of the Queen's Proctor to charge collusion, and then make no attempt to prove it. The right of the Queen's Proctor as such to intervene is limited to cases in which the parties are charged with collusion; if he intervenes on any other ground, he does so as one of the public, and must bring the matters upon which he relies before the Court by affidavits—a course fully provided for by the present rules. The application must be rejected.

[The cases referred to were *Chaddock* v. *Chaddock* (1); *Boulton* v. *Boulton* (2); *Gray* v. *Gray* (*Queen's Proctor intervening*) (3); *Latour* v. *Latour* (*Queen's Proctor intervening*) (4); *Forster* v. *Forster* (5); *Dering* v. *Dering* (*Queen's Proctor intervening*) (6); *Vivian* v. *Vivian* (*Leslie intervening*). (7)]

Cur. adv. vult.

Dec. 22. THE JUDGE ORDINARY (President). In this case the Queen's Proctor, by the direction of the Attorney General, has applied for leave to intervene after a decree nisi, but without alleging that he had reason to suspect collusion between the parties. The application is, I understand, made for the purpose of settling the practice in these cases, as to which there appears to be some doubt. The 7th section (23 & 24 Vict. c. 144) enacts that at any time during the progress of the cause, or before the decree is made absolute, any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney General may deem necessary or expedient. This part of the

(1) 29 L. J. (P. M. & A.) 55. 6 Jur. N.S. 340
(2) 2 Sw. & Tr. 405; 31 L. J. (P. M. & A.) 27.
(3) 2 Sw. & Tr. 554; 31 L. J. (P. M. & A.) 83. 7 Jur. N.S. 472, 703
(4) 2 Sw. & Tr. 144; 33 L. J. (P. M. & A.) 88. 10 Jur. N.S. 395
(5) 3 Sw. & Tr. 151; 32 L. J. (P. M. & A.) 206.
(6) Law Rep. 1 P. & M. 531.
(7) Law Rep. 2 P. & M. 100.

1875

HUDSON v. HUDSON.

section does not by itself give the Queen's Proctor any right to intervene; it merely authorizes him to act upon the directions of the Attorney General. Those directions must necessarily depend upon the nature of the case, and upon the stage at which the proceedings between the parties have arrived. If the information leads the Queen's Proctor to suspect collusion, then the direction of the Attorney General will be that the Queen's Proctor should intervene in the suit, and in that case he will follow the course prescribed in rules 68 and 69, after having obtained the leave of the Court. That he is entitled to under ordinary circumstances, upon the statement of counsel that the Attorney General has directed the intervention: *Anon.* (1) But if the Queen's Proctor does not, from the information he has received, suspect collusion, the statute does not enable him to intervene at all in his official capacity. This was held in *Masters* v. *Masters* (2), where the Judge Ordinary said: "Since the case of *Latour* v. *Latour* (*Queen's Proctor intervening*) (3), the Queen's Proctor, in cases like the present, was right in appearing as one of the public." If, then, the information given to the Queen's Proctor before the decree nisi does not give rise to a suspicion of collusion, but only brings to his knowledge matters material to the due decision of the case, he is not entitled to take any step, and the direction of the Attorney General would probably be that he should watch the case to see if those material facts are brought to the notice of the Court. If at the trial they should be, there will be no need for the Queen's Proctor to do anything more, for he would not be entitled to have the same charges tried over again, unless material facts were not brought to the notice of the Court. If, however, those material facts are not so brought to the notice of the Court by the parties, he will then be entitled as one of the public, but still acting under the direction of the Attorney General, to shew cause against the decree being made absolute; and in that case he must follow the course prescribed by the 70th and following rules. And this appears to have been the course formerly adopted by the Queen's Proctor: *Masters* v. *Masters* (2); *Harding* v. *Harding.* (4) I shall

(1) 2 Sw. & Tr. 249.
(2) 34 L. J. (P. M. & A.) 7.
(3) 3 Sw. & Tr. 144; 33 L. J. (P. M. & A.) 89. 10 Jur N.S. 325
(4) 34 L. J. (P. M. & A.) 9. 11 Jur N.S. 814

therefore leave the Queen's Proctor to proceed in that manner on the present occasion. If this should be found inconvenient, I have it in my power to alter the rules applicable to the subject; but finding, as I do, that that was the old practice, and no reason satisfactory to my mind having been given for departing from it, I shall for the present require the Queen's Proctor, where he does not allege collusion, to proceed as one of the public.

Solicitors for petitioner: *Shaw & Co.*

IN THE GOODS OF BONELLI.

Dec. 7.

Evidence—Foreign Law.

The evidence of a person whose only knowledge of the laws of a foreign country is derived from having studied them cannot be received in proof of the operation or effect of such laws.

THE Cavaliero Gaetano Bonelli, an Italian subject, died at Turin, having made his will, by which he appointed his children universal legatees. An application having been made in this country for a grant of administration with the will annexed to be granted to one who described himself as the curator of the dormant inheritance of the deceased, evidence was required to shew the powers and position in Italy of a curator of the dormant inheritance of a deceased. An affidavit was filed to the effect that the office of curator was as nearly as possible identical with that of administrator in this country.

Cur. adv. vult.

Dec. 7. SIR J. HANNEN (President). In this case I required evidence of the foreign law with reference to the position of a curator of the dormant inheritance of the deceased, and a gentleman of the name of John Reeve, describing himself as a certified special pleader, and as familiar with the Italian law, has made an affidavit that the office of curator is as nearly as possible identical with that of administrator. I was anxious, if possible, to allow administration to go on this evidence, but it has been decided in the case of *Bristow* v. *Sequeville* (1) that the law of a foreign

(1) 5 Ex. 275; 19 L. J. (Ex.) 289.

1875

IN THE GOODS OF BONELLI.

country cannot be proved even by a juris consult, if his knowledge of it be derived solely from his having studied at a university in another country. In the present case there is nothing to shew that Mr. Reeve has any knowledge of Italian law but from the study of it in this country. I must therefore reject the application on the present materials.

Solicitor: *Cramp.*

Dec. 7.

IN THE GOODS OF PEARN, OTHERWISE PEARDON.

*Will—Execution—Signature in Attestation Clause—*15 *Vict. c.* 24.

The deceased with his own hand wrote out a will, which concluded with an attestation clause "signed, published, and declared by the said A. B., the testator, as and for his last will and testament, &c." At the time of execution the deceased declared the paper to be his will in the presence of two witnesses, and asked them to witness it, which they did, but he did not himself sign it in their presence, nor was there any direct evidence that the witnesses saw the signature. The only signature of the deceased was in the attestation clause:—

Held, that, under 15 Vict. c. 24, the execution was valid.

THOMAS PEARN, otherwise Peardon, of St. Austell, Cornwall, tailor, died on the 1st of December, 1874. He left a will bearing date the 9th of August, 1870, in his own handwriting, which concluded as follows:—"In witness whereof I hereunto set my sign this ninth day of August, one thousand eight hundred and seventy. Signed, published, and declared by the said Thomas Pearn, otherwise Peardon, the testator, as and for his last will and testament in the presence of us, who in his presence, and in the presence of each other, at his request, subscribe our names as witnesses hereto, John Lanyon, draper, St. Austell, William Joseph Moon, St. Austell." It appeared from the affidavit of John Lanyon that on the day of the date of the said will the deceased called at the shop of the deponent at St. Austell and said he wished to speak to him, and they together proceeded into the drawing-room. The deceased then said, I want you to sign and witness my will; who can we have for the other witness? Will not Moon do?" William Joseph Moon was a young man in deponent's service. Moon being called, entered the room, and deceased then said, "I

wish you and Mr. Lanyon to witness my signing my will." The deceased then took the will from his pocket, and wrote in the presence of deponent and Moon the words "ninth day of August," as they now appear on the will. The deponent then said to deceased, "Did you write these clauses?" pointing to the clause commencing with the words, "In witness, &c.," and ending with the words "one thousand eight hundred and seventy," and the clause beginning "Signed, published, and declared, &c.," and ending "witnesses hereto," and he replied, "I wrote them both, and I wrote all the will." He then put his hand on the will, and in the presence of deponent and Moon said, "In the name of God I declare this to be my last will and testament, and I wish you to witness it," and thereupon the two witnesses signed it; but the deceased did not do so. The deponent believed that the deceased fully intended the paper so produced by him as and for his final will. William Joseph Moon confirmed this statement of what took place on the occasion.

Bayford moved for probate of the will. Under 15 Vict. c. 24, the fact of the name being in the attestation clause would not affect the validity of the execution if the testator intended by such signature to give effect to the writing signed as his will: *In the Goods of John Walker* (1); *In the Goods of Casmore.* (2) In each of these cases there was, in addition to the signature in the attestation clause, another signature by the deceased to which he might have attributed some effect.

SIR J. HANNEN (President). The cases cited have a considerable bearing upon the question before me. There is also another case, *In the Goods of Huckvale* (3), from which I gather that I am at liberty to judge from the circumstances of the case whether the name of the testator was on the will at the time of execution, and if I am satisfied it was so, I may decree probate. In that case Sir J. S. Wilde said: "The will is a holograph will, and the attestation clause, which is very full and complete, is also holographic; so that the deceased knew what

(1) 2 Sw. & Tr. 354; 31 L. J. (P. M. & A.) 62. 8 Jur N.S. 315

(2) Law Rep. 1 P. & M. 653.

(3) Law Rep. 1 P. & M. 375.

1875

IN THE GOODS OF PEARN.

formalities were required in executing a will. The signature is in the attestation clause, and plainly put in subsequently to the other writing. It is also proved that she asked the persons who signed the attestation clause to witness her will. The probability is therefore very strong that the name of the deceased now there was on the paper when the witnesses signed it." On the authority of that case I think probate may be granted.

Proctors: *Tebbs & Sons.*

Dec. 21.

NICHOLAS *v.* DRACACHIS.

Probate Suit—Property of the Deceased, Shares in Shipping—Power of the Court to prohibit dealing in such Shares—17 & 18 *Vict. c.* 104, *s.* 65; 36 & 37 *Vict. c.* 66, *s.* 16.

The Court of Probate, as a division of the High Court of Justice, has vested in it the jurisdiction formerly exercised by the High Court of Chancery, and therefore may, under the 65th section of 17 & 18 Vict. c. 104, direct an order to issue prohibiting the dealing in any share of a ship for a time and on conditions to be named therein, and the registrar of shipping, on being served with such order or an official copy thereof, must obey the same.

STANISLAUS PAUL ZIZINIAS, late of Westbourne Green, Middlesex, merchant, died on the 3rd of November, 1872, and, on the 6th of December, 1873, administration to his effects, on the supposition of his having died intestate, was granted to the defendant, Nicholas Zizinias Dracachis. The property of the deceased at his death consisted principally of shares in the ship *Thessalia*, of which A. Papyani & Co. are the managing owners. These shares were registered at Liverpool in the name of the defendant on his becoming administrator. Subsequently, a will, bearing date the 24th of October, 1865, was found, in which George Lucas Ziffo and Richard Emmanuel Rodocanachi were appointed executors, Cleanthe, the wife of Demetrius Masea, residuary legatee, and the plaintiff Marian Nicholas a legatee to the amount of 1500*l.* with plate and jewellery. The plaintiff having cited the executors and the residuary legatee to take probate or administration with the will annexed of the goods of the deceased,

Clay moved the Court for an administration pendente lite, or

See also the Admiralty Ct Act 1861 (24 & 25 Vic c 10) s 12
& Supr Ct of Judic Act 1873 (36 & 37 Vic c 66) s 34.

for an order for the preservation of the estate, and to restrain any person from dealing with the shares in the ship *Thessalia* (part of the deceased's estate), or from paying over or receiving the profits thereof. By 36 & 37 Vict. c. 66, s. 16, all the jurisdiction of the High Court of Chancery is vested in the High Court of Justice, and by Order LII., Rule 3, a court or judge, on the application of any party to an action, may make an order for the detention, preservation, or inspection of any property being the subject of such action. By 17 & 18 Vict. c. 104, s. 65, the Court of Chancery is authorized to issue an order prohibiting, for a time to be named in the order, any dealing with a ship or share therein, and to annex thereto any terms or conditions it may think fit, and every registrar, upon being served with such order or an official copy thereof, shall obey the same.

Searle, for the defendant, was quite willing that an order to restrain the dealing in the shares should issue.

The Court made the order accordingly.

Solicitor for plaintiff: *G. H. Hale.*

Solicitor for defendant: *A. J. Miles.*

[BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL* ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.]

Jan. 21.

THE REV. HENRY KEET, WESLEYAN MINISTER, APPELLANT; THE REV. GEORGE EDWARD SMITH, CLERK, AND OTHERS, RESPONDENTS.

Inscription on Tombstone in Churchyard—"Reverend"—Wesleyan Minister.

The daughter of H. K., a Wesleyan minister, was buried in the churchyard of the parish where her father resided. The incumbent of the parish refused to allow a stone with an inscription describing the deceased as daughter of the "Rev^d." H. K., "Wesleyan Minister," to be erected over the grave:—

Held, that the presence of the words "The Rev^d." before "H. K., Wesleyan Minister," in the inscription, which was otherwise unobjectionable, was not a sufficient justification for the incumbent refusing to allow the tombstone to be erected within the churchyard.

The word "reverend" is not a title of honour or dignity; and a person prefixing the word to his name does not thereby claim to be a person in holy orders.

APPEAL from a decision of Sir R. Phillimore (judge of the

* *Present*:—THE LORD CHANCELLOR (Lord Cairns), LORD HATHERLEY, LORD PENZANCE, THE LORD CHIEF BARON (Sir Fitzroy Kelly), THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, and SIR JAMES HANNEN.

1876

KEET v. SMITH.

Arches Court of Canterbury), given on the 31st of July, 1875, refusing to issue a faculty for the erection in the churchyard of the parish church of Owston Ferry, in the county and diocese of Lincoln, of a tombstone with a particular inscription, hereinafter described. The matter originally came before the chancellor of the diocese of Lincoln (Dr. W. G. F. Phillimore), sitting as judge of the Consistory Court of Lincoln, who gave judgment on the 3rd of June, 1875, declining to issue any citation.

The facts are fully set forth in the report of the case in the court below. (1)

Dr. A. J. Stephens, Q.C., and *Bayford* (*Jeune* with them), for the appellant. As to the discretion of the ordinary to withhold a faculty when the petitioner has shewn that he is legally entitled to it, see Ayliffe's Parergon, 2nd ed., p. 221; *Butt* v. *Jones* (2); *Sharpe* v. *Hansard.* (3) When the appellant applied for a faculty to the Dean of Arches he was entitled to have his case decided on the opinion of the dean and not of the bishop, who had no judicial right to interfere. The dean had no right to act on a mere private letter of the bishop.

[THE LORD JUSTICE JAMES. The dean had no right to look at it.]

None whatever. [*Harper* v. *Forbes* (4) and *Ex parte Medwin* (5) were then referred to.] The dean submitted his judicial discretion to the dissent of the incumbent and the authority of the bishop, and relied for so doing on the 6th paragraph of the preface concerning the service of the Church. As regards the rights of the incumbent, he is allowed a limited discretion by the ordinary with regard to the propriety of inscriptions on the tombstones erected in the churchyard; and the Consistory Court can overrule that discretion. The parson has no greater freehold in the churchyard than he has in the church or chancel. As to the limited jurisdiction of the incumbent, see *Maidman* v. *Malpas.* (6) *Breeks* v. *Woolfrey* (7), relied on by the learned dean, has no application to this case; as far as it goes it is in favour of the

(1) Law Rep. 4 A. & E. 398.
(2) 2 Hagg. Eccl. 424.
(3) 3 Hagg. Eccl. 337.
(4) 5 Jur. (N.S.) 275.
(5) 1 E. & B. 609; 22 L. J. (Q.B.) 169.
(6) 1 Hagg. Cons. 205.
(7) 1 Curt. 880.

appellant. Respecting the damnum sustained by the incumbent from the loss of his pasturage, that would be less than one farthing per annum, and need not be referred to.

[THE LORD CHANCELLOR. No.]

Then the question remains, whether this particular inscription is opposed to the law of the land, to religion, or to decency. It is unnecessary to argue that the Church authorities have no power to confer titles.

[THE LORD CHANCELLOR. No; that power belongs solely to the Crown.]

It is assumed that the right to the title or epithet "reverend" depends upon episcopal ordination.

[THE LORD CHANCELLOR. No.

THE LORD JUSTICE JAMES. What possible connection is there between episcopal ordination and the title "reverend"?]

There is not the remotest connection.

[THE LORD CHANCELLOR. Is it appropriated by authority to any class whatever?]

No; the clergy have no exclusive right to it. As to the user of the epithet "reverend" in the fifteenth and sixteenth centuries, it was applied to the laity—to persons of distinction, both male and female. Ladies and gentlemen addressed each other, and servants addressed their masters and mistresses, as "reverend" and "right reverend." The clergy addressed the laity by the epithet of "reverend," and the laity addressed the clergy by the epithet "sir": see the Paston Letters, edited by Sir James Gairdner (London, 1872), vol. i. pp. 42, 227, 312, 521, 533; vol. ii. pp. 81, 87, and 88.

[THE LORD CHANCELLOR. How far do you carry the argument? Should a clergyman allow a young lady to be described on a tombstone as "reverend"?]

No; it has not been the user since the time of Henry VII.

[LORD PENZANCE. You put it that there is no vested right in the clergy to the exclusive use of this epithet?]

There is no right by user, statute, or Royal grant by which the clergy can exclusively claim the epithet of "reverend": see Dugdale (London, ed. 1846), vol. viii. p. 1282, col. 2; where the epithet "reverend" is not even applied to a cardinal archbishop, who is

1876

KEET v. SMITH.

designated as Mr. John Morton. In the sixteenth to the eighteenth centuries, the judges of the superior Courts were usually designated as "reverend" and "very reverend." In A.D. 1585, Sir W. Staunford is styled in the title-page of his Pleas of the Crown, "Le tres reverend judge." In 1675 permission was given by eleven judges to the "Reverend and Learned" Sir Francis Moore, Serjeant-at-Law, to publish his Collection of Cases; and in the 2nd edition of 1688 the same epithets are used. In 1726, in the Preface to Ventris' Reports, it is said, "The reverend and learned judge, who was the compiler of these Reports." This seems to have been the last time that the epithet "reverend" appears in the Reports in the description of the judges.

[THE LORD JUSTICE JAMES. Take it that the title has been given to judges.

THE LORD CHANCELLOR. It was given as a laudatory epithet, not as a title.]

In the sixteenth century, about the time of the Reformation, the ordinary title of the parochial clergy was "sir," or "master," or "mister"; and the epithet "reverend" was not applied as a general and distinctive title to the parochial clergy until the end of the seventeenth century. It was, however, occasionally applied to clergymen as a token of special personal esteem. Early in the seventeenth century the Puritan and Presbyterian ministers appropriated the epithet of "reverend," and before the parochial clergy. The epithet "reverend" was applied to the parochial clergy as a class in the preamble of Charles II.'s Act of Uniformity. Refusing the epithet of "reverend" to Wesleyan ministers is unreasonable, for the Wesleyans do not differ in any point of doctrine from the Church of England. They do not, however, recognise as necessary for salvation episcopal ordination, or episcopal jurisdiction, nor consider them founded upon apostolical succession. But episcopal ordination and jurisdiction, are matters of discipline rather than doctrine. Since 1811 the Wesleyan ministers, by a resolution of their "Conference," have invariably called themselves "reverend," and have been so described in inscriptions on tombstones in very many of the churchyards of the Church of England. From 1814 to 1874 sixteen loyal addresses have been presented by the Wesleyans to the Sovereign, with replies, and the secretaries of state,

from Lord Sidmouth down to Mr. Hardy and Mr. Cross, began their replies with the title of "reverend." Both the Prerogative Court of Canterbury and, since 1858, the Probate Court have granted probate of wills to Wesleyan ministers as "reverend." There has been a universal user by the Wesleyan ministers, and a recognition of that user. If the parochial clergy are now to set up a legal and exclusive title to it, some one at least ought to come forward and shew whence it arose, and what is the ground of the claim, especially as it is not founded either upon statute law, common law, or Royal grant.

The respondents did not appear.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. In this case the appellant is a Wesleyan minister, residing at Owston Ferry, in the county of Lincoln; and being a parishioner in that parish, and having had the misfortune to lose an infant daughter in the year 1874, who was buried in Owston Ferry churchyard, he was desirous of erecting over her tomb a tombstone in a form a facsimile of which is given in the appendix in the case. The Rev. George Edward Smith is the vicar and incumbent of Owston Ferry. How far Mr. Smith might have objected to any tombstone being erected, or how far he might have objected to the tombstone in question being erected upon the ground that in size or composition it was unsuitable for the place where it was proposed to be erected, it is unnecessary for their Lordships to consider, because no objection upon any of those grounds has been made by the vicar. In fact, in point of form no objection has been made by the vicar at all, because he has not communicated any objection in writing to the appellant, nor has he appeared at any of the stages of the case in the Court below, nor has he appeared before their Lordships upon the present occasion. The only notification we have of his mind or feeling on the subject is derived in this way. It is stated in the petition that the appellant was informed by a stonemason that the vicar objected to the erection of the tombstone, and thereupon the appellant wrote to the vicar a letter, dated the 2nd of June, 1874, in these words:—"Sir, The inclosed is a copy of the inscription we gave to Mr. Barningham" —he being the stonemason—"to be placed on the stone denoting

1876

KEET v. SMITH.

where the remains of my dear child lie. I have been informed by him that you have an objection to it. Will you therefore please write me on the subject at your earliest convenience." To that letter the vicar sent no reply, and on the 8th of June the appellant addressed to him another letter in these words: — "Sir, Having heard from Mr. Barningham that you object to the words 'Rev.' and 'Wesleyan minister' being inserted, and as I find similar expressions on tombstones in Epworth churchyard, will you kindly give me the reasons of your objection? It will be a great disappointment not to be able to have a stone. May I beg the courtesy of a reply per bearer." It is stated and not controverted that to this letter the appellant received only a verbal reply through a servant to the following effect: "Tell Mr. Keet that I saw Mr. Barningham last week, and that I have no more to say." Under these circumstances, their Lordships are obliged to assume that the vicar has no objection in the abstract to the erection of a tombstone; that he has no objection to the particular tombstone, as to its size or composition; and that his only objection is that which appears to have been stated in conversation to Barningham, that the inscription contains the words "Rev^{d}." with "Wesleyan minister." The inscription is in this form: "In loving memory of Annie Augusta Keet, the younger daughter of The Rev^{d}. H. Keet, Wesleyan Minister, who died at Owston Ferry, May 11th, 1874, aged 7 years and 9 months." And then there is added, "Safe sheltered from the storms of life." Their Lordships, therefore, have to consider, in their opinion, this, and this only, whether the presence of the words "The Rev^{d}." before "H. Keet, Wesleyan Minister," is a sufficient justification for refusing to allow this tombstone to be erected; and whether, therefore, a faculty should not issue authorizing the erection of the tombstone. This appears to have been, in the minds of both the learned judges who have dealt with this case before, the question and the only question which they had to decide.

Now, it appears to their Lordships to have been considered in the Court below that the words "The Reverend" or the word "reverend" prefixed to a proper name was to be treated in some manner as a title—a title of honour or of dignity; and that titles being, as we all know, matters of right, and, as it were, of pro-

perty, no person who could not shew a particular legal right to use this word "reverend" as a title of honour or of dignity could be permitted on any public occasion to make use of it; and further, it appears to have been the opinion of the learned judges that the clergy of the Established Church in this country possessing episcopal ordination had, as holding orders, a right and an exclusive right,—exclusive, if not shared by the clergy of the Church of Rome, but in other senses exclusive,—to use that title "reverend." In the opinion of their Lordships, the word "reverend" is not a title of honour or of dignity. It is an epithet, an adjective used as a laudatory or complimentary epithet, a mark of respect and of reverence, as the name imports, but nothing more. It has been used for a considerable length of time, not by any means for a very great length of time, by the clergy of the Church of England; for the time has been when that title was not commonly borne by them. It has been used in ancient times by persons who were not clergymen at all. It has been used for a considerable time, and it is used at the present day, in common parlance and in social intercourse, by ministers of denominations separate from the Church of England, by ministers of the Wesleyan Church, by ministers of bodies holding a congregational form of government, and by Presbyterian ministers. It is a title which in ordinary life is conceded to them, and which, as among each other, they use. Under those circumstances, it appears to their Lordships impossible to treat this word as a title of honour exclusively possessed by the clergy of the Church of England, so that the minister of another denomination claiming to place it upon a public inscription should be refused permission so to do. To this it may be added, that if ever there were a case in which no possible misapprehension could arise even in the minds of those, if those there be, who think that the Church of England alone should possess the title, it is this case; because upon the face of this inscription there is not merely the use of the word "reverend," but there is appended to the name "The Reverend H. Keet" the words "Wesleyan minister." Therefore, the inscription in substance states that although the person placing it there uses as a prefix the term "reverend," he does not thereby claim to be a person in holy orders, but claims to be, and to be

1876

KEET v. SMITH.

nothing more than, what in fact he is, a minister of the Wesleyan body. Their Lordships, therefore, dealing with this, which is the only objection made to the erection of this tombstone, are compelled to say, and they say without any hesitation, that in their judgment it does not afford a sufficient reason for refusing to allow the erection of the tombstone. They are therefore of opinion that a faculty should issue for this purpose; and they will humbly report to Her Majesty that the suit be remitted to the Arches Court in order to give effect to this recommendation.

Proctor for appellant: *G. H. Brooks.*

Feb. 16.

[BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL* ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY JENKINS *v.* COOK.

Refusal to administer the Holy Communion—"Lawful Cause" of Refusal— 1 *Edw.* 6, *c.* 1, *s.* 8—27*th Canon—Church Discipline Act,* 3 *&* 4 *Vict. c.* 86.

In a suit under the Church Discipline Act against the respondent, for having, on the 4th of October, 1874, repelled from the Holy Communion, without lawful cause, the appellant, a parishioner, who had presented himself after due notice, the respondent answered that he did so for and on account of the writing and publishing by the appellant, of certain letters addressed to the respondent, and of his causing to be printed and published a certain volume of Selections from the Old and New Testaments, and for no other cause or reason whatever. It appeared that one of the letters protested against the irreligious tendency of a sermon (not produced) which had been preached by the respondent, and that another of the letters (a private and solicited communication) explained that the construction which he, the appellant, placed upon certain parts of the Bible not being the same as the construction which, in his opinion, was generally placed thereon, he omitted such parts from the said volume and from his family reading. It further appeared that the appellant had published a book of family prayers, compiled entirely from the Liturgy of the Church of England, and that he had stated that he valued the

---

* *Present:*—THE ARCHBISHOP OF CANTERBURY, THE LORD CHANCELLOR (Lord Cairns), THE ARCHBISHOP OF YORK, LORD HATHERLEY, LORD PENZANCE, THE LORD CHIEF BARON (Sir Fitzroy Kelly), THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, and SIR JAMES HANNEN.

Book of Common Prayer as "only second to the Bible itself." It further appeared that the appellant was of irreproachable moral character:—

Held, that no lawful cause of repulsion had been shewn; that the appellant was not "an open and notorious evil liver" within the meaning of the Rubric; neither was he a "common and notorious depraver of the Book of Common Prayer" within the meaning of the 27th Canon.

The primâ facie right of a parishioner to partake of the Holy Communion having been (though probably independent of statute) distinctly declared by 1 Edw. 6 c. 1, s. 8, subject to the minister's denial of the same for lawful cause, *Quære*, whether the canons could of their own authority prescribe "causes" which would be sufficient or "lawful" within the meaning of the statute.

Quære, whether opinions (erroneously on the evidence attributed to the appellant by the Court below) in denial of the existence and personality of the devil, and of eternal or other punishment for sin in a future state, can be entertained or expressed by a member of the Church, whether layman or clergyman, consistently with the law and with his remaining in communion with the church.

APPEAL from a decision of Sir R. Phillimore, as Dean of the Arches Court of Canterbury, dismissing the appellant's suit with costs.

The facts and pleadings are fully set forth in the report of the case in the Court below. (1)

The grounds of appeal appear in the following arguments:—

Dr. Deane, Q.C., Fitzjames Stephen, Q.C., and *Tristram*, for the appellant.

Dr. A. J. Stephens, Q.C., and *Jeune*, for the respondent.

Dr. Deane, Q.C. The question is one of the deepest importance to the appellant, and to all lay members of the Established Church; for if the ruling of the Dean of Arches be sustained, that any clergyman may refuse the administration of the Holy Sacrament to a parishioner, and go to his ordinary for protection, the parishioner is without remedy. Such appeal to the ordinary is a private appeal, to which the aggrieved layman is no party. Those lay members who hold opinions inconsistent with those held by the parish priest will be shut out from the Sacrament. The book published by the appellant was a perfectly innocent, harmless, and proper book; the sting of it lay in what was expressed in the 5th article of the responsive plea, which set out the letter of the appellant, dated the 20th of July, 1874, in respect of which the Dean

(1) Law Rep. 4 A. & E. p. 463.

1876

JENKINS v. COOK.

of Arches has found the appellant guilty of constructive heresy; holding, it seemed, that the letter referred to every omission made in the book, and that every omission was made because the appellant thought it incompatible with decency or religion.

As to the respondent being protected from responsibility by the reference to the ordinary—

[THE LORD CHANCELLOR. Was the refusal of the 4th of October reported to the Ordinary?]

No. His defence is that he took the course prescribed by the Rubric, and that, until he received a definite answer, he did not know whether it was his duty to refuse the rite or not. The respondent relied upon the 27th Canon, and on the circumstances stated in the 11th article of the responsive plea. (1)

[THE LORD CHANCELLOR. I should have thought that both sides sincerely wished to submit the question of the justification of repelling Mr. Jenkins to our decision.

THE ARCHBISHOP OF CANTERBURY. The judge has made the whole case turn on the bishop having given no order, or an order in favour of the respondent.]

The Rubric means that if the clergyman repels, he is to give notice to the bishop in order that the bishop may proceed against the unworthy applicant. Here the bishop gave no order, and therefore no question arises as to its effect in relieving the clergyman of responsibility. There is nothing to take away the right of the parishioner to proceed against the clergyman, and enforce the remedy given him by the Church Discipline Act, ss. 3 and 23.

Then, as to the respondent's grounds for refusing to administer, the Dean of Arches relied upon the 27th Canon, and the 2nd Rubric, before the Communion Service. The appellant was constructively held to be an open and notorious evil liver. But the offence referred to in the Rubric must have been so open and notorious that the congregation is thereby offended, and must be satisfied.

[THE LORD CHANCELLOR. "Notorious evil liver" seems to point to moral conduct. It may be an important point whether, under the Rubric and Canons, a clergyman is made a judge of opinion, however erroneous, of his parishioners.]

(1) Law Rep. 4 A. & E. at p. 466.

By the statute of Edw. 6, if not by common law, every parishioner is entitled to receive the sacrament at the hands of the incumbent. Repulsion cannot be justified except in the case of excommunicated persons, notorious evil livers, blasphemers, defamers of God's Word. The appellant's book does not justify such repulsion. Point is said to have been given to that book by the letter of the 20th of July and the conversation of the respondent with Mrs. Jenkins.

[THE LORD CHIEF BARON. Do you contend that the words "incompatible with religion and decency" are limited in their application to the subject of the personality of the devil by this conversation with the wife?]

That is the contention. As regards the book, the animus of omission is to omit passages not tending to edification. As regards the personality, a variety of meanings is given to the words hell and devil: see, with regard to the former, Pearson on the Creed, vol. 1, p. 272, et seq.: and with regard to the latter, see Farrar's Life of Christ (5th ed.) vol. 1, p. 236, note, and p. 456; Psalm xci.

[THE ARCHBISHOP OF YORK. What has Mr. Jenkins said in denial of eternal punishment?]

Nothing; he has omitted from his book passages which refer to it.

[LORD PENZANCE. It has been assumed that everything which he omitted he denied.

THE LORD CHANCELLOR. He has introduced nothing into his book which is not in the Book of Common Prayer or the Bible?]

No; and he has included collects, e.g., that for Advent Sunday, which involve a complete confession of faith. The charge being specific and confined to the two subjects of the personality of the devil and eternity of punishment, the dean had no right to import other subjects and impute constructive heresy. [He referred to *Wilson* v. *Fendall* (1), where the articles were written by clergymen of the Church of England, and to p. 206 of Essays and Reviews.] The dispute was narrowed down to a single issue, whether the appellant would withdraw the letter of the 20th of July, both the respondent and the dean being totally regardless whether he also withdrew in sincerity the opinions there expressed.

[LORD PENZANCE. In the 27th Canon and in the Rubric, ques-

(1) 2 Moo. P. C. (N.S.) 375. 10 Jur. N.S. 407

1876
JENKINS
v.
COOK.

tions of doctrine have nothing to do with the right to repel; that right results only from the open and notorious evil life whereby the congregation has been offended. Besides, we have no definite statement of doctrine laid down by the appellant, we are left to infer what his opinions are.

THE ARCHBISHOP OF YORK. It ought to have been distinctly alleged and proved what his opinions are.

THE ARCHBISHOP OF CANTERBURY referred to *Wilson* v. *Fendall*. (1)]

Even if the appellant denied the personality of Satan and the eternity of punishment, he is not liable to exclusion from the Sacrament in consequence. If the doctrine of eternity of punishment is taken from the Athanasian Creed, then the clergymen who object to it are, equally with the appellant, unworthy to receive the Sacrament. The services and prayers which recognise the existence of Satan are a code of devotion, not of doctrine required to be believed.

Fitzjames Stephen, Q.C., on the same side. Five propositions are contended for on behalf of the appellant: (a) that the right of a layman to have the Sacrament administered to him is absolute, subject to the clergyman's shewing that he is an open and notorious evil liver; (b) that, whatever took place in this instance, there was nothing open or notorious; (c) that there was nothing which can be described as evil living, even if it be assumed that the appellant's opinions are illegal; (d) that the doctrines imputed to the appellant, even if illegal in the case of a clergyman, are not illegal in the case of a layman; (e) that there is no proof that the appellant holds any doctrines which would be illegal in the case of a clergyman.

With regard to (a), it is so obvious that it is only the judgment of the Court below which requires it to be raised. The Dean of Arches seems to think that if a clergyman suspects a man of being an open and notorious evil liver, he may refuse the Sacrament to him provisionally and until the bishop gives an order and direction. But the right to receive the Sacrament is a statutory one, see 1 Edw. 6, c. 1, s. 8, unless the clergyman refuses for lawful cause shewn. That must be the cause shewn in the Rubric, for the

(1) 2 Moo. P. C. (N.S.) at p. 433. 10 Jur N S. 467

Canons of 1603, never having been ratified by Parliament, are not binding on the laity; and cannot cut down their statutory rights. It is a question how far the clergy are bound by them; they certainly would not justify a clergyman in disobeying statute law.

[THE ARCHBISHOP OF CANTERBURY. The statute speaks of a "lawful" impediment. That might be defined by canon law, and by the Canons of 1603.

THE ARCHBISHOP OF YORK. Are we not trying a clerk, and is not canon law applicable?

THE LORD CHANCELLOR. Suppose the Canons declare that a clergyman should not administer the Sacrament to persons whose names began with A, would that take away the statutory right?

SIR BARNES PEACOCK referred to the 3rd section of the Church Discipline Act (3 & 4 Vict. c. 86), which refers to laws ecclesiastical.]

The laws of England upon ecclesiastical subjects are laws ecclesiastical, and statute law overrides the canons. Upon the Rubrics and the exhortation it is clear that the doctrine is, that the Sacrament is of great advantage if taken worthily, and of great disadvantage if taken unworthily; and that every one takes or leaves it at his own risk. The Dean of Arches (see his judgment, Law Rep. 4 A. & E. 492) has greatly misconceived the rite. The judge of unworthiness is the conscience of the communicant. There is not the slightest encouragement given to the clergyman to ascertain how the parishioner stands in regard to his religious duties, and to seek out grounds for repelling him. Such ground, moreover, must be, not the good of the applicant, but to prevent scandal in the congregation. See the language of the Rubric and Exhortation as quoted by the Dean of Arches. A penal disability cannot be fixed upon a man except by judgment of a competent court. A clergyman is not the judge of consciences; he cannot refuse the Sacrament to a believer in transubstantiation; he cannot refuse it on suspicion that an applicant has committed a murder, for the man might have repented, and at least the congregation would know nothing about it, and would not be offended or scandalised.

[THE LORD CHIEF BARON. Could an applicant say to the clergyman, "I don't believe a word of your doctrine, but I require you to administer to me the Sacrament"?]

1876

JENKINS v. COOK.

Yes; the clergyman could remonstrate, but he would have no other power. At one time the reception of the Sacrament was a qualification for office; the clergyman would not have the power to impose that disqualification. There are no words, even in the Canons, to meet the case of heretics, who are not even mentioned. See the Canons, 26, 27, & 109.

[*Dr. A. J. Stephens, Q.C.*, objected to these Canons being read in Latin, for they were not signed by the king in that language.]

It is very doubtful whether Canon 27 was not overruled by the Toleration Act. Suppose the parishioner confesses to the clergyman that he denies the redemption of mankind, if the latter may on that account repel, he would be obliged to act officially on a mere matter of private conversation. The true principle is, that a clergyman may repel only when an open and notorious circumstance offends the congregation.

[THE LORD CHIEF BARON. I desire to put the case of a parishioner conscientiously disbelieving some doctrine which lies at the root of the Christian faith. Is he within the Rubric, and can he be repelled?]

Emphatically he cannot. In such a case the communicant receives unworthily at his own risk. A clergyman is bound by law to read the burial service in cases where notoriously he must feel that the words prescribed do not apply. The choice is between the inconvenience of making the clergyman a judge, and making him read the service in every case, whether its language applies or not, and the policy of the law is to choose the latter.

[THE LORD CHANCELLOR. It is remarkable that the statute of Edw. 6 refers to the exhortation to every man to examine himself lest he receive the Sacrament unworthily. You say that the "lawful" cause of repulsion must stand as high in point of stringency as the statute itself. In that case you must read in the statute the words of the rubric, we will assume, also, the words of the Canon, and then Mr. Cook must make out that the appellant is either a notorious and open evil liver or a depraver of the Book of Common Prayer.]

Yes, and there are authorities that even in the Roman Catholic Church a priest would have no right to repel a communicant in consequence of anything learnt in confession.

[THE ARCHBISHOP OF CANTERBURY. How do you read the words in the Rubric, "If he have done any wrong to his neighbours by word or deed, so that," &c.? Must that have been proved in a Court of law?]

The clergyman's right to repel would depend upon the question whether the wrong was open and notorious. A clergyman has no right to refuse the marriage service to those who have no moral right to marry. The clergyman is bound to perform the rite in that and in other cases. If moral wrong ensues, that is the responsibility of the parties availing themselves of the rite.

As to (b), the correspondence was private; one letter, that of the 24th of July, was confidential and solicited; and the volume itself, though published in 1864, was not observed by the clergyman himself till 1874. There was nothing open or notorious.

As to (c), (d), and (e), it is very difficult to ascertain upon the evidence what the appellant's opinions really are.

[THE LORD CHANCELLOR. It is a very serious thing to pronounce a man an open and notorious evil liver on account of any opinions, however erroneous.]

The class of persons intended to be repelled are those described in the 109th Canon. Although a clergyman cannot legally do so, it cannot be an offence for a layman to dissent from the articles and doctrines of the Church.

[THE ARCHBISHOP OF CANTERBURY. The statute called the Uniformity Act (1 Eliz. c. 2) directs conformity to the Book of Common Prayer; it does not command belief.]

As to the law of heresy, see Hale's Pleas of the Crown, Part I. c. 30. 9 & 10 Wm. 3, c. 32, ended a long and cruel controversy, though it does not appear whether it was ever acted upon. See also 29 Car. 2, c. 9; and if a layman is to be fixed as a heretic he must be prosecuted under that Act. In 1 Eliz. c. 1, s. 36, which established the High Commission Court, heresy was limited to that which is adjudged to be such by the canonical scriptures, the four general councils, and so on. It was repealed by the repealing Act of 1863, which, however, expressly saved all principles of common law contained in the repealed Acts. And by Hale's Pleas of the Crown it is a common-law principle that a man must be adjudged a heretic by decree of a competent Court before he can

1876

JENKINS v. COOK.

be treated as such. [He referred also to Neal's History of the Puritans, vol. iii. p. 419; vol. iv. p. 27.] For gross and open immorality there is a short and sharp remedy. But if a clergyman wants to correct doctrinal error, he must, according to the ruling of the law, go through a legal process for the purpose, and have the erring parishioner excommunicated as a heretic. For it does not follow that because the Church holds a body of doctrine to be true, therefore any one who objects to part of it is a notorious evil liver. He can only be touched by excommunication consequent upon a conviction for heresy. The Dean of Arches seems to think that a layman may not even question the doctrines of the Church on pain of being treated as an open and notorious evil liver. But see *Fendall* v. *Wilson* (1), where one of the passages in Mr. Wilson's essay goes further than anything attributed to the appellant.

Dr. A. J. Stephens, Q.C., for the respondent. The act of repelling the appellant by the respondent, on the 24th of July, 1874, was in accordance with the statute law. It was merely provisional and inchoate, being a necessary step towards acquiring the bishop's judicial order and direction in the matter. The Church Discipline Act is confined to proceedings against the clergy for offences against the laws ecclesiastical, and in this case Mr. Cook must be shewn to have contravened the 1 Edw. 6, c. 1, the Acts of Uniformity, or canons of 1603. The Ordination Service and the Communion Service should be read as one office. The former office lays down the general principles which are to guide the minister in the discharge of his sacred office. The latter office lays down the particular rules by which he is to carry out those principles in the administration of the Holy Communion. The minister is to be a faithful dispenser of the Word of God and of his Holy Sacraments. This faithfulness involves a conscientious dispensing of those sacred ordinances, so that they shall not be dishonoured by being administered to unfit recipients. From the commencement of the Reformation to the present time, the statute law has provided for the faithful dispensing of the Lord's Supper, by giving power to the minister to withhold it for lawful cause. In the second and third paragraphs of the Rubric before the Communion Office two

(1) 2 Moo. P. C. (N.S.) 375. 10 Jur N.S. 406

modes of repelling are prescribed, (a) one *out* of the church, (b) and the other *in* the church. By the second paragraph, if there be "an open and notorious evil liver . . . the curate, having knowledge thereof, shall call him and advertise him that in anywise he presume not to come to the Lord's Table, until he hath openly declared himself to have truly repented." This is a repelling, not at the time of the celebration of the Holy Communion, but by forbidding the person when *out* of church not to come to the Holy Table. The third paragraph contemplates a repelling *in* church. The proviso in the third paragraph deals with both these modes of repelling, but requires in both cases that the minister shall give an account of the same to the ordinary within fourteen days; and thereupon "the ordinary is to proceed against the offending person according to the canon."

[THE LORD CHANCELLOR. I do not see that the modus operandi differs in the two cases, only the causes of repulsion differ.]

In either case notice to the bishop is necessary.

[SIR BARNES PEACOCK. In order that the bishop may proceed against the party repelled according to the canon.]

In this case the bishop had notice of all the facts and circumstances of the case, and the clergyman was justified in refusing the Sacrament to the appellant until he had received the direction of the ordinary.

[THE LORD CHANCELLOR. Does the Rubric say that the bishop must direct, and that the responsibility of the clergyman ceases on his reference?]

By the 6th paragraph of the preface to the Prayer Book concerning the service of the church, for the appeasing of all doubts "concerning the manner how to understand, do, and execute the things contained in this book; the parties that so doubt, or diversely take anything shall alway resort to the bishop of the diocese, who by his discretion shall take order for quieting and appeasing of the same. . . . . And if the bishop be in doubt, then he may send for the resolution thereof to the archbishop."

[THE LORD CHANCELLOR. That is a wholesome recommendation to the parties, but supposing the clergyman stands on his rights.]

By the act of repelling, the respondent had only done his duty,

1876

JENKINS v. COOK.

and could do nothing further until he had procured the "order and direction" of the bishop in the matter. The repelling referred to was the "advertising" out of church. It took place two months before the 2nd of October, it was a provisional repelling, until the bishop had determined the question. The facts appear in the respondent's letters to the appellant of the 24th of July, 1874, and the 31st of July. There has, therefore, been a compliance with the Rubric.

[LORD HATHERLEY. Could a threat to repel, not followed by actual repulsion, constitute an ecclesiastical offence and give a cause of action?]

The "advertising" out of church was an actual repulsion, after which the respondent sought the order and direction of his bishop, who did not give any, and until he did so, the repulsion was justifiable.

[THE LORD CHANCELLOR. Where does the Rubric justify that proceeding?]

The Rubric before the Communion Service: see *Martin* v. *Mackonochie.* (1) The respondent acted bonâ fide, and had both probable and lawful cause for repelling. The respondent thought Mr. Jenkins an evil liver—a term which includes a hinderer and slanderer of God's Word. In 1562, at the time of Elizabeth's Act of Uniformity, unbelief and misbelief were the subjects of penal enactment, and were dealt with as "evil living." Sins against faith made a man an evil liver according to the preamble of Charles II.'s Act of Uniformity. The first Exhortation in the Communion Service deals with hindering and slandering God's Word as an instance of evil living.

[THE LORD CHANCELLOR. If you read the whole of the first Exhortation is it not addressed to the conscience of the communicant? Is the curate to decide if a man is living in malice or envy?]

The language of the first Exhortation is as follows: "Therefore, if any of you be a blasphemer of God, an hinderer or slanderer of his Word, an adulterer, or be in malice, or envy, or in any other grievous crime, repent you of your sins, or else come not to that Holy Table."

(1) Law Rep. 2 A. & E. at p. 191.

This Exhortation should be read in conjunction with the preceding part of the same office, which deals with the duty of the curate to repel from the Holy Communion evil livers. Four classes of sins are enumerated in this Exhortation, as crimes excluding persons from the Lord's Table, and disqualifying them from the reception of the Lord's Supper. (a) Sins against the faith, or spiritual sins, such as blasphemers of God, who are clearly evil livers. (b) Hinderers or slanderers of God's word. (c) Adulterers. (d) Sins against charity, as malice or envy. When, therefore, hinderers or slanderers of God's Word are placed between blasphemers of God and adulterers, it cannot be legitimately maintained that hinderers and slanderers of God's Word are not evil livers within the first Communion Rubric, while blasphemers and adulterers are included within its scope.

The curate must provisionally decide if there be "evil living" amounting to a disqualification to be received at the Holy Table. The language of the second Rubric includes all disqualifications mentioned in the Exhortation. As to the notoriety of the evil living, the appellant's letter of the 6th of September admits it.

[THE LORD CHANCELLOR. The admission is not to that effect. The notoriety admitted applies to the repulsion, not to any evil living.

THE LORD JUSTICE JAMES. What passed between the bishop and the appellant has nothing to do with the respondent's case.

SIR BARNES PEACOCK referred to the 13th article of the responsive plea.]

Down to the 16th of September, 1874, as appears from the bishop's letter of that date, the appellant had not intimated his belief in the Nicene Creed, which is an integral part of the Communion Service. The bishop having taken order and direction in the matter, as appears from that letter, the requirements of the Rubric and the 27th Canon have been complied with by the respondent. It is said, that the Canons do not bind the laity, and therefore cannot be applied here; but this is a penal proceeding against a clergyman who is bound by them. The Dean of Arches is right in saying that the Rubric must be construed, wherever it is possible, so as to agree with the Canons. So far as regards the

1876

JENKINS v. COOK.

laity, *Middleton* v. *Crofts.* (1) does not apply to the present case, which is a proceeding against a clergyman under the Church Discipline Act. *Escott* v. *Mostin* (2) decides that the Canons are binding upon the clergy. The clergyman can provisionally repel a parishioner from the Holy Communion, that discretion, however, being subject to the order and direction of the ordinary both by the preface to the Prayer Book and by the Canons.

[THE LORD JUSTICE JAMES. Do you support the proposition that the administration of the Sacrament is placed at the clergyman's discretion subject to the bishop's approval?]

Yes; by the laws ecclesiastical the bishop's statutable duty was to "order and direct" the minister; and until he did so, the repelling by the minister was only provisional and inchoate, and cannot be made the subject of proceedings under the Church Discipline Act. The publication of the volume in question was not an offence, but, taken in connection with the letter of the 20th of July, 1874, it was a hindering and slandering of God's Word. (3) No doubt the publication of the book per se was perfectly harmless, but taken in connection with the letter it became a spiritual offence under the laws ecclesiastical.

[THE LORD JUSTICE JAMES. How does the letter make that to be a public and notorious offence which, on your admission, was previously no offence at all?]

It was a communication to the respondent as a public officer, and such publication entirely changed the character of the volume by stigmatising the passages omitted as incompatible with religion and decency.

[THE LORD CHANCELLOR. Suppose it was an indictable offence, and the man was indicted for depraving, &c., and the letter, under the circumstances of this case, were put in, would that be evidence to go to the jury of notoriety?]

It would at least be evidence quo animo the book was written.

Jeune, on the same side. The respondent having acted bonâ fide, is not amenable to proceedings under the Church Discipline Act; he has a discretion to repel, and no action lies unless mala fides is shewn.

(1) 2 Atk. 650, 669.

(2) 4 Moo. P. C. 104.

(3) For the character of the omissions, see judgment of the Dean of Arches, Law Rep. 4 A. & E. 479.

[LORD PENZANCE referred to *Barton* v. *Wells* (1); the suit there was in form criminal, but the substance of a right was the real thing in issue.]

The mode of proceeding ought to have been an appeal to the bishop under the last clause of the 27th Canon. From the bishop there might be an appeal to the Archbishop of Canterbury in the Metropolitan Court, and thence to the Privy Council. Then the circuitous mode of a prosecution would have been avoided.

[THE LORD JUSTICE JAMES. Has the bishop power under that clause to hear witnesses, try it in curiâ or in camerâ, or by what procedure?]

See *Boyd* v. *Phillpotts* (2) for an illustration of the procedure which ought to have been adopted. The appellant ought to have insisted upon having an order from the bishop; and a mandamus would lie to the bishop to compel him to give it.

[LORD PENZANCE. The principle is that a mandamus should not be granted where any other remedy can be had.

SIR BARNES PEACOCK. If this Canon is not binding on the laity, can it affect the layman's rights, or his remedy in case of refusal to administer to him the Sacrament, contrary to the provisions of an Act of Parliament?]

Of course the Canon cannot take away an antecedent right, but it may give a right. The Canons are a set of laws made with the consent of the clergy, and therefore binding on the clergy. Where the Canons express antecedent law, it is good law; but it is not necessary to argue in this case that they are law proprio vigore. The statute says that there must be no exclusion of a parishioner from the Sacrament except for lawful cause, and the question is, what was lawful cause at the time of Edward VI. So far as the Canon gives a right of appeal, it is good law, for it extends instead of taking away the rights of a layman. The lawful cause of Mr. Jenkins' repulsion was under the Rubric; the clergyman in his discretion, subject to being overruled by the bishop, considered him a notorious evil liver.

[THE ARCHBISHOP OF CANTERBURY. You say that the clergyman's discretion may be overruled by the bishop?]

Yes; and that is the proper remedy of the appellant. In

(1) 1 Hagg. Cons. 21. (2) Law Rep. 4 A. & E. p. 297.

1876

JENKINS v. COOK.

Ayliffe's Parergon, p. 476, which is a work of authority on canon law, it is said that the Sacrament is not to be given to schismatics or others. The Canon and the Rubrics ought to be construed together, and the result is, that in all cases mentioned by both of them, the clergyman has a discretion subject to the appeal to the bishop. Before the Prayer Book of 1662, the bishop might say that the clergyman was right, but the layman could apply again and again, and so there was nothing for the protection of the clergyman. The object of the direction in the Rubric of 1662 to the bishop to prosecute offenders under the Canon, was to give power to the bishop so to act that the repulsion would be permanent.

[THE ARCHBISHOP OF CANTERBURY. Then you contend that the words in the Rubric of 1662 give a statutory force to the Canon.]

Further, there is a greater power of rejection in the Prayer Book of 1662 than there was under the Rubric of 1549; and the proceedings at the time of the Savoy Conference shew this to have been desired by the Puritans, and conceded by the Episcopalians.

See Cardwell's History of the Conferences, p. 293, for declaration of Charles II., as to alterations to be made in the Prayer Book; also pp. 317, 363.

Dr. Deane, Q.C., in reply. (a) As to jurisdiction, has an ecclesiastical offence been committed or not? The preface to the Prayer Book is alleged to shew that the remedy is by application to the ordinary; but that passage refers to a totally different class of cases from this. Never has any plea to the jurisdiction been raised in matters of vestments, and of the mode of conducting divine service. Still more is the rejection of a parishioner from the Holy Communion, without lawful cause, an ecclesiastical offence. It involves the deprivation of a statutory right, and down to 1827 the consequences were most serious in regard to the disqualifications imposed by such repulsion. For definition of ecclesiastical offence see Church Discipline Act (3 & 4 Vict. c. 86), s. 3. (b) As to the lawful cause. The cause alleged is, that the appellant was an open and notorious evil liver, by reason of certain opinions held. But the 26th Canon shews that the expression is

confined to those who "live in sin notorious without repentance." It is by the 27th Canon that the power to exclude is extended to the case of a common and notorious depraver of the Book of Common Prayer. But depraving does not mean the omitting certain passages, but the openly rejecting certain passages. An ill-mumbled mass was a depraving. Then, as to argument from chronology, the statute which made the reception of the Sacrament a statutory right was in 1547. The three Rubrics of 1549, 1552, and 1559, are precisely the same, but in 1603 came the Canons. If the Rubric of 1662 meant to import anything from the Canons, why did not the legislature say so? There is nothing to deprive the parishioner of his remedy in a court of law. As to the Exhortation being an enlargement of the Rubric, if the words were intended to authorize repulsion, they would have been inserted in the Rubric; as they stand they are merely addressed to the conscience of the communicant.

Feb. 16. The judgment of their lordships was delivered by

THE LORD CHANCELLOR. In this case the appellant, a parishioner in the parish of Christ Church, Clifton, institutued proceedings under the Clergy Discipline Act, in the Court of the Bishop of Gloucester and Bristol, against the respondent, the vicar of the parish, for an offence against the laws ecclesiastical in refusing to administer to the appellant the Sacrament of the Holy Communion.

The case was sent by letters of request to the Court of Arches, and on the 16th of July, 1875, a sentence was pronounced by the Dean of Arches, dismissing the suit against the respondent and condemning the appellant in costs.

From this sentence the appellant appeals to Her Majesty.

There are no facts in dispute in the case, and the allegations as to the refusal complained of, and as to the grounds of the refusal, are extremely simple.

The appellant alleges that on the 28th of September, 1874, he gave notice in writing to the respondent of his intention to present himself to receive the Holy Communion at the mid-day service on the following Sunday, the 4th of October, 1874, and that having presented himself accordingly, he was, without lawful cause,

1876

JENKINS v. COOK.

repelled, and the respondent refused to administer the Sacrament to him.

To this allegation the respondent answers that he on the day in question did refuse to deliver to the appellant, or to permit the appellant to receive, the elements of the Holy Communion when he presented himself to receive the same, for and on account of the writing and publishing by the appellant of certain letters particularly referred to, and for and on account of his causing to be printed and published a certain volume of selections from the Old and New Testaments, and for no other cause or reason whatsoever.

These allegations therefore raise the issue, and the only issue, between the parties. In order, however, to appreciate properly the justification relied upon by the respondent, it is necessary to refer more particularly to the letters and volume referred to in the defensive allegation, and to the circumstances under which those letters were written.

The appellant states, and it is not controverted, that he has been a resident parishioner of Christ Church for six years past; that he is a member of the Church of England, and has during that time regularly attended divine service at the parish church, and has also during that period been in the habit of receiving the Holy Communion in the church monthly; that during his attendance at divine service he has always conducted himself reverently, joining in the responses in accordance with the directions of the Rubric; that he believes in the inspiration of the canonical books of the Old and New Testaments, that Scripture contains all things necessary for salvation, and in the doctrine of the atonement for the sins of mankind by the death of our Lord and Saviour Jesus Christ on the Cross; and he exhibits a Book of Family Prayers compiled entirely from the Liturgy of the Church of England which he has published, and which is regularly used by him at family prayers in his own house.

It appears that the appellant in the year 1865 had also printed and published a volume entitled "Selections from the Old and New Testaments." This volume has been produced before their Lordships. It consists of extracts or selections from the Bible, apparently arranged for the convenience of reading at family

prayers. Many chapters and portions of chapters are omitted, but the volume is a bulky one, although not containing any note, comment, or matter other than the text of the Bible so far as it is given.

It appears, further, that on the 6th of July, 1874, in reference to a sermon preached by the respondent in the parish church, the appellant wrote to the respondent a letter as follows:—

"My dear Sir,—As one of your parishioners, who accepts his conscience as the voice of God within him, I beg to protest most emphatically against the irreligious tendency of your sermon of last night. I quite believe that you would not willingly deceive others, but it is my opinion that no difficulties as to language or books should stifle what is imprinted in every man's breast by his Maker—that is to say, the knowledge of right and wrong.—I am, my dear Sir, yours very sincerely,

"Henry Jenkins."

What was the subject or substance of this sermon, or what were the expressions used therein, their Lordships have no means whatever of knowing, and no evidence has been adduced on either side as to it.

It appears that, about two years before this time, the volume of selections had been sent by the appellant to the respondent, but the respondent had laid the volume aside, and apparently had not looked at or examined it.

After, however, receiving the letter of the 6th of July, 1874, the respondent for the first time examined the volume of selections, and, as he states, shortly afterwards called on the appellant at his residence, in order to communicate with him in reference to the volume. But the appellant, as the respondent alleges, refused to have any communication with him in reference thereto.

At this part of the case the evidence of Mrs. Jenkins may properly be referred to. She states that, on the 20th of July she called on the respondent, and told him she did so hoping to do away with any unpleasant impression in his mind arising from the appellant's abrupt manner when the respondent had called at the appellant's house. She then asked him if he meant to carry out the threat conveyed in his last remark to the appellant on that day. The respondent said he did mean to carry it out most em-

1876

JENKINS v. COOK.

phatically. "Then he went on; he commenced about the volume of selections that had been sent him two years ago. He said, at the time he received them he thought they were meant for family worship, which I said they were. He had not looked at them, he had put them by on a shelf, or something to that effect, but since his visit to the appellant he had examined the volume thoroughly from beginning to end, and he found all passages relating to the devil and evil spirits were excluded from the selection." Further on Mrs. Jenkins continues: "I attempted to draw his attention to the appellant's character and manner of life from his youth up, the honesty of all his motives, and his blamelessness in every condition of life as husband and father, and he said that only made the case more difficult to manage. Then he said, Let Mr. Jenkins, as he cannot sit down and talk like a man, write me a letter, a calm letter, and say he believes in the devil, and I will give him the Sacrament."

On the same day, and apparently in consequence of this suggestion of the respondent that the appellant should write him a letter, the appellant wrote to him in these words:—

"My dear Sir,—Mrs. Jenkins has very kindly called upon you in order to arrange matters, with, I am afraid, very poor success. With regard to my book—'Selections from the Old and New Testaments,'—the parts I have omitted, and which has enabled me to use the book morning and evening in my family, are, in their present generally received sense, quite incompatible with religion or decency (in my opinion). How such ideas have become connected with a book containing everything that is necessary for a man to know I really cannot say, and can only sincerely regret it. —I am, my dear Sir, yours very sincerely,

"Henry Jenkins."

To this the respondent replied, by a letter of the 24th of July, 1874, as follows:—

"Dear Sir,—It would be a great relief to me if I could find in your letter of the 20th instant, or in any other communication written or spoken, something to shew that I have misunderstood your opinions, or that you have changed them for the better. Unhappily the conclusion I cannot but form from your letters,

words, and printed 'Selections from the Old and New Testaments,' is, that of set purpose you reject very many portions of Holy Scripture. That you have, for instance, cut out, as you have from the Bible what is therein written concerning Satan and evil spirits, is to me terrible evidence of how far you have allowed yourself to go in mutilating the Word of God. Large differences of opinion concerning Scriptural matters no prudent or charitable minister of the Gospel would condemn, but there are perversions and denials which no faithful minister will sanction, lest he allow unbelief a recognised place in the Church of Christ. With such perversions and denials, I grieve to say, I am driven to connect yourself; while they remain not retracted or disavowed you cannot be received at the Lord's table in my church. I hope you will feel that my course is directed according to conscience, and not by resentment. I quite forgive your behaviour when I called, and although you would then listen to nothing, if you will converse quietly with me my time shall be willingly given for that purpose. May the Spirit of Truth deliver you from the errors you have adopted, and in the hope of seeing this my prayer answered, I remain, dear Sir, yours faithfully,

"Flavel Cook."

In answer to this the appellant wrote another letter, which is the last that need be referred to, dated the 25th of July, 1874:—

"My dear Sir,—Thinking as you do, I do not see what other course you could consistently have taken. I shall, nevertheless, come to the Lord's table as usual at 'your' church, which is also mine.—I am, my dear Sir, yours very sincerely,

"Henry Jenkins."

These, then, are the letters written by the appellant, and this is the character of the volume the writing and publishing of which are stated by the respondent to have constituted the only cause for which he refused to permit the appellant to partake of the Holy Communion. The question is, do they constitute a sufficient cause?

The primâ facie right of a parishioner to partake of the Holy Communion might probably be maintained irrespective of any specific statutory enactment; but as the right is distinctly declared

1876

JENKINS v. COOK.

by the statute 1 Edw. 6, c. 1, s. 8, their lordships may conveniently refer to the words of that enactment as it is set out in p. 530 of the first volume of the revised Statutes:—

"And allso that the preist which shall ministre the same shall at the least one day before exhorte all psons which shalbe present likewise to resorte and prepare themselfs to receive the same, and when the daie prefixed comethe after a godly exhortacon by the minister made, wherin shalbe further expressed the benefitt and comforte promised to them which worthelie receive the said hollie Sacrament, and daunger and indignacon of God threatened to them wch shall presume to receive the same unworthelie, to thende that everie man maye trye and examyn his owne conscience before he shall receive the same, the saide minister shall not withowt lawfull cawse denye the same to any parsone that wool devoutlie and humblie desire it, anny lawe statute ordenance or custome contrarie therunto in any wise notwithstanding."

In the argument before their lordships, it has not been contended that, for the purpose of this case at all events, the "lawful cause" mentioned in the statute, was to be sought for elsewhere than in the Rubric of the Book of Common Prayer prefixed to the Communion Service, or in the Canons of 1603, and their lordships, therefore, find it unnecessary to consider whether there could be any further or other "lawful cause" within the meaning of the statute. Neither is it necessary for their lordships to decide, and they do not decide, that the Canons, which do not, as such, bind the laity, could, of their own authority, prescribe "causes" which would be sufficient or "lawful" within the meaning of the statute. In this particular case the "lawful" causes relied upon are that the appellant must be taken, under the circumstances, to have been "an open and notorious evil liver" within the meaning of the rubric, and to have been "a common and notorious depraver of the Book of Common Prayer," within the meaning of the 27th Canon. Their lordships will assume that the last-named cause, that mentioned in the Canon, would be, if made out, as valid and lawful a cause as that of being "an open and notorious evil liver," within the meaning of the Rubric.

The learned judge, from whose sentence the present appeal is

brought, has expressed his opinion upon this point in the following words: "I am of opinion that the avowed and persistent denial of the existence and personality of the devil did, according to the law of the Church, as expressed in her Canons and Rubrics, constitute the promoter 'an evil liver,' and 'a depraver of the Book of Common Prayer and administration of the Sacraments,' in such sense as to warrant the defendant in refusing to administer the Holy Communion to him, until he disavowed or withdrew his avowal of this heretical opinion; and that the same consideration applies to the absolute denial by the promoter of the doctrine of the eternity of punishment, and, of course, still more to the denial of all punishment for sin in a future state, which is the legitimate consequence of his deliberate exclusion of the passages of Scripture referring to such punishment."

Their lordships must, in the first place, observe that the learned judge appears to have considered that, in the Rubric to which reference is here made, the words defining a cause for repulsion are "an evil liver," and, in the Canon, "a depraver of the Book of Common Prayer." This, however, is not the case. The Rubric, after stating that "So many as intend to be partakers of the Holy Communion shall signify their names to the curate at least some time the day before;" proceeds as follows:—

"And, if any of those be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, so that the congregation be thereby offended, the curate, having knowledge thereof, shall call him and advertise him not to come to the Lord's table until he hath openly declared himself to have truly repented and amended his former naughty life, that the congregation may thereby be satisfied, which were before offended; and that he hath recompensed the parties to whom he hath done wrong, or at least declare himself to be in full purpose to do so as soon as he conveniently may."

The words, again, of the 27th Canon, which is the Canon relied on, are these:—"No minister, when he celebrateth the Communion, shall wittingly administer the same to any but to such as kneel, under pain of suspension; nor, under the like pain, to any that refuse to be present at public prayers according to the orders

1876

JENKINS v. COOK.

of the Church of England; nor to any that are common and notorious depravers of the Book of Common Prayer and administration of the Sacraments, and of the orders, rites, and ceremonies therein prescribed, or of anything that is contained in any of the articles agreed upon in the convocation, one thousand five hundred and sixty-two, or of anything contained in the book of ordering the priests and bishops; or to any that have spoken against and depraved His Majesty's sovereign authority in causes ecclesiastical; except every such person shall first acknowledge to the minister, before the churchwardens, his repentance for the same and promise by word (if he cannot write), that he will do so no more, and except (if he can write) he shall first do the same under his handwriting to be delivered to the minister, and by him sent to the bishop of the diocese or ordinary of the place. Provided that every minister so repelling any, as is specified either in this or the next precedent constitution, shall, upon complaint, or being required by the ordinary, signify the cause thereof unto him, and therein obey his order and direction."

The "cause," therefore, which under the rubric is sufficient to warrant a minister, of his own authority, and without any trial, in repelling a parishioner from the Holy Communion is that he is "an open and notorious evil liver," who thereby gives offence to the congregation, and, under the Canon, that he is "a common and notorious depraver of the Book of Common Prayer."

Their lordships therefore will proceed to consider whether the appellant is brought under either of these descriptions. And, in the first place, their lordships must observe that if they had here to examine whether the appellant has in point of fact either entertained or expressed the opinions attributed to him by the learned judge, or if they were called upon to decide that those opinions, or any of them, could be entertained or expressed by a member of the Church, whether layman or clergyman, consistently with the law and with his remaining in communion with the Church, they would have looked upon this case with much greater anxiety than they now feel in its decision. They desire to state in the most emphatic manner, both that there is not before them any evidence that the appellant entertains the doctrines attributed to him by the Dean of Arches, and that they do not mean to decide

that those doctrines are otherwise than inconsistent with the formularies of the Church of England. This is not the subject for their lordships' present consideration. What, and what alone, they have to inquire is whether the appellant can be properly held to be "an open and notorious evil liver" within the meaning of the Rubric, or whether, in the words of the Canon, he was "a common and notorious depraver of the Book of Common Prayer."

As to the first of these inquiries, there is absolutely no evidence whatever that the appellant was an evil liver, much less an open and notorious evil liver. The term "evil liver," according to the natural use of the words, is limited to moral conduct, and the distinction between conduct and belief is clearly recognized in the Canons, especially in the contrast between the 109th and 110th. Against the moral character of the appellant there is no evidence, and no imputation; and it appears, from statements which are uncontroverted, to have been irreproachable. Their lordships, therefore, put aside this justification of the respondent as wholly inapplicable to the case, and they can only express their regret that, through an inaccuracy in the use of words, an imputation so misplaced and so irksome in its nature should have been made.

Is, then, the appellant a common and notorious depraver of the Book of Common Prayer? The only specific reference to the Book of Common Prayer which is traced to the appellant is the statement that the Book of Family Prayer already mentioned was compiled by him entirely from the Book of Common Prayer, and that, in a letter from him to the bishop, dated in September, 1874, he writes that he values the Book of Common Prayer "only second to the Bible itself."

The mode, however, in which it is said that the appellant was a depraver of the Book of Common Prayer is this. It is assumed that all parts of the Holy Bible not printed in the "Selections" are omitted because they are rejected on the ground of the doctrine which they teach; and it is said that some parts so omitted are found in the Book of Common Prayer, or that doctrines in the Common Prayer are supported by some of these omitted passages. And it is contended that omission is rejection, and rejection depravation.

In none of these propositions, nor in their logical connection,

1876

JENKINS v. COOK.

can their lordships concur. Omission is not rejection. If it were, the Lectionary in the Prayer Book would be open to this grave charge. Nor is rejection, however censurable or heretical, necessarily depravation. The terms "deprave or depraver," in their more ancient signification, are now little used; but their meaning in the 16th century may be well collected from the statute of Edw. VI. already referred to, where we find these expressions applied to the Sacrament of the Holy Communion:

"Whatever person shall deprave, despise, or contempne the saide moste blessed Sacrament by any contemptuouse wordes, or by anny wordes of depravinge, dispisinge, or reviling, shall suffer imprisonment, &c."

But was the appellant "a common and notorious depraver of the Book of Common Prayer?"

Now it was admitted in the Court below, and in the argument before their lordships, that the publishing and circulation of the book termed "Selections" could not possibly amount of itself to a depravation of the Book of Common Prayer, and could not, indeed, be construed to be an offence of any kind. But it was contended that these selections, coupled with the expressions in the letter of the 20th of July, 1874, amounted to the offence in question.

That letter must be construed with reference to the interview between the respondent and Mrs. Jenkins, which took place on the same day, and out of which interview the writing of the letter arose. It is obvious that the words, "the parts I have omitted," cannot refer to all the portions of the Bible not printed in the selections; but must be limited to those parts which were more particularly referred to by the respondent at the interview. Construing the letter in connection with what passed at the interview, the expressions in it, which are not very distinct or intelligible, do not go farther than this, that the construction which the appellant placed upon certain parts of the Bible not being the same as the construction which, in his opinion, was generally placed upon those parts, he omitted them from his family reading. What his own construction is, or what he supposes to be the generally received construction, is not stated, and it would not be allowable, even if it were necessary, to arrive at either construction by surmise or suspicion.

But it does not appear to their lordships to be necessary to criticise more minutely the expressions in this letter, for the important question still remains, whatever be the construction of the letter, can the appellant in consequence of it be said to have been "a common and notorious depraver of the Book of Common Prayer?" Now the letter was not written by the appellant spontaneously. A message was sent to him through Mrs. Jenkins inviting him to write a letter to the respondent. It was proposed that the letter should be, and the letter was sent as, a friendly and private, as it was also a solicited, communication. It appears to their lordships that even were there anything in the letter which could amount to a depravation of the Book of Common Prayer, which they do not suggest or think there is, still it would be impossible to hold that the writing of such a letter, under the circumstances which they have mentioned, could make the appellant "a common and notorious depraver."

These observations would dispose of the case, were it not that their lordships think that they should notice an argument much pressed at the Bar, but to which their lordships can attach no weight, namely, that by reason of the intervention, or possible intervention, of the bishop of the diocese, another remedy was, or might have been, open to the appellant, and that he ought not to have taken proceedings under the Clergy Discipline Act. This argument in fact divided itself into two parts. It was said, in the first place, that the respondent had duly reported to the bishop the grounds on which he had repelled the appellant from the Holy Communion, and that he was then entitled to wait until he received some order from the bishop on the subject, and that no such order was given. The other form of the argument was that the appellant had, under the Rubric and Canons, a right of appeal to the bishop personally, and that he either had not so appealed, or if his communications with the bishop amounted to an appeal, the bishop had expressed his opinion against the appellant, and in favour of the respondent.

As to the first part of this argument, their lordships are clearly of opinion that the repelling by the respondent of the appellant must be judged of at the time when it took place, and could not be affected by anything afterwards occurring between the respon-

1876

JENKINS v. COOK.

dent and the bishop. At the time it took place it was either justifiable or unjustifiable. If justifiable, the respondent is, of course, entitled to succeed; but, if unjustifiable, the appellant must be immediately entitled to a remedy, and their lordships can discover nothing which shifts the responsibility from the respondent and places it upon the bishop.

Their lordships also think that the remedy to which the appellant is entitled is that which in this case he has sought for. He complains that the respondent has committed an offence against the laws ecclesiastical by wrongfully refusing him admission to the Holy Communion, and he has followed the process prescribed by the Clergy Discipline Act. Their lordships do not find in the Rubric prefixed to the Communion Office any indication of an appeal to the bishop by a parishioner repelled from the Communion. They find that an intimation is to be given to the bishop by the minister, but this is apparently for a purpose entirely different, namely, that the bishop may proceed against the person repelled to punish him pro salute animæ. With regard to an appeal under the Canon, their lordships do not understand how an appeal given by a Canon, even if it were given, could take away a higher right to maintain proceedings for a violation of a right protected by statute. But their lordships do not understand that the Canon referred to in this case, the 27th, professes to give the repelled person any right of appeal; and even if it did, the bishop in the present case appears throughout to have expressed the opinion that he ought not himself to decide the question between the appellant and the respondent, but that it should be decided in proceedings such as have been taken.

On the whole, their lordships are of opinion that they must advise Her Majesty to reverse the sentence of the Dean of Arches, and in remitting the cause to admonish the respondent, the Reverend Flavel Smith Cook, for having, on the 4th of October, 1874, without lawful cause, refused to deliver to the appellant, or permit the appellant to receive, the elements of the Holy Communion, and, further, to monish him to refrain from committing the like offence in future.

Their lordships have no doubt that the respondent has acted throughout in good faith, and in the conscientious belief that he

was discharging a duty imposed upon him, and they have also not failed to observe that this controversy appears to have been preceded by an uncalled for, and, as they think, uncourteous letter, written by the appellant to the respondent, his minister, protesting against and condemning a sermon preached by him. Their lordships cannot however hold that there is in these circumstances sufficient to warrant them in departing from the general rule according to which the respondent must pay the costs in the Court below and on appeal.

Proctors for appellant: *Pritchard & Sons.*
Proctors for respondent: *Moore & Currey.*

[IN THE COURT OF APPEAL.]

May 3.

THE M. MOXHAM. (7151.)

Foreign Soil—English Ship—Foreign Law—Damage—Commission to take Evidence.

An English company possessed of a pier in a port in Spain instituted a cause of damage against an English ship for negligently injuring the pier. The ship-owners by their answer pleaded that by the law of Spain the master and mariners of a ship, and not the owners, were liable for negligent navigation:—

Held, reversing the decision of the judge of the Admiralty Division, that the case was governed by the law of Spain, and that that part of their answer ought not to be struck out.

Commission to take evidence in Spain as to the law of Spain refused.

10 QBD 524, 556

THIS was a cause of damage instituted by an English company against the owners of an English ship to recover damages for the injury done, by the alleged negligent navigation of the ship, to a pier belonging to the English company, but situated in a Spanish port. The ship was arrested in Spain, but was released on an agreement with the owners that their liability should be determined by proceedings in the English courts. The owners pleaded as part of their answer that the collision happened within the territory of Spain, and that if it was caused by negligence it was negligence of the master and mariners of the ship, and that by the law of Spain the master and mariners, and not the owners, were in such a case liable for damages. The plaintiffs moved to

1876

THE M. MOXHAM.

strike out this part of the answer. Sir R. J. Phillimore, the judge of the Admiralty Division, held that the Spanish law was not applicable to the case, and directed the answer to be reformed accordingly: ante, p. 43, where the pleadings are fully stated.

The defendants appealed.

Feb. 3. *Watkin Williams, Q.C., J. C. Mathew,* and *E. C. Clarkson,* for the defendants. For the purpose of this argument we must take the law of Spain to be as it is by the answer alleged to be, and that the owners of a ship are not liable for her negligent navigation. The judge of the Admiralty Division considered himself bound by the case of *The Halley* (1), but that is the converse of this. In *Lloyd* v. *Guibert* (2) the question was as to the authority of the master received from his owners. The defendants can be held liable only for an act for which they would be liable in the country where it was committed, and also in this country: *Mostyn* v. *Fabrigas* (3); *Scott* v. *Seymour.* (4) In *General Steam Navigation Co.* v. *Guillou* (5) the defendants did not plead that they were not liable by the law of France. *Bullock* v. *Caird* (6) is the latest case. *Phillips* v. *Eyre* (7) is strong in favour of the defendants. If the act is lawful and just where it is done, then no doubt no action in this country will lie; but here it is admitted that the act was wrongful, and the only dispute is as to the persons liable. If a man travels, his liability varies with the country in which he is, and he does not carry English law with him. We say that the act done was not done on the high seas, but in a Spanish port, where the ship could only come under the implied condition that she would be liable to Spanish law: *Cope* v. *Doherty* (8); *The Exchange* v. *McFaddon* (9); Twiss's Law of Nations, p. 229. If two Spanish ships came into collision, and the action was brought here against the owners of one, could they plead that by the law of Spain they were not liable?

Butt, Q.C., Benjamin, Q.C., and *R. E. Webster,* for the plaintiffs.

(1) Law Rep. 2 P. C. 193.
(2) Law Rep. 1 Q. B. 115.
(3) 1 Sm. L. C. 7th Ed. p. 658.
(4) 1 H. & C. 219; 31 L. J. (Ex.) 457. 8 Jur N.S. 548
(5) 11 M. & W. 877.
(6) Law Rep. 10 Q. B. 276.
(7) Law Rep. 6 Q. B. 1.
(8) 2 De G. & J. 614; 27 L. J. (Ch.) 600. 4 Jur N.S. 699
(9) 7 Cranch, R. 116.

This is the case of an English ship with an English master put on board by the owners, who thereby become liable for his acts. It is no answer in an English court, that by the law of the country where the act was done the owners would not be liable. They have impliedly made themselves liable. A carrier on land is in a different position; but an English ship carries her law with her, and those on board carry their personal status with them: *Reg.* v. *Anderson.* (1) If this question were tried in Spain, the owners would be held liable when it was proved that such were the terms under which the master was placed on board. A ship in a foreign port is subject to the laws of both countries. Somebody must be liable to the plaintiffs; they cannot sue the master and crew here, and when the owners are sued, they answer they are not liable. The wrong was begun on board the ship, though the injury was done on land. If this action between English owners had by agreement been tried in New York instead of in England, the plea of Spanish law must have been admitted.

JAMES, L.J. This is the case of the owner or occupier of a piece of Spanish soil bringing an action against the owner of an English ship, for damage done by that ship in knocking down a pier attached to the Spanish soil. In this respect it is a very novel action, and very grave difficulties indeed might have arisen as to the jurisdiction of this Court to entertain any action or proceedings whatever with respect to injury done to foreign soil. But the question of jurisdiction has, probably, been successfully got over by what has been done in this case, inasmuch as the ship in question, the owner of which is sued, and which by a figure of speech may be called the delinquent ship, having been arrested in Spain, was released upon an agreement between the parties that all remedies against the ship and against the owners should be tried in this country. Such an agreement would give jurisdiction by contract—not only jurisdiction by consent—and it must be taken that the parties have agreed that their ship should be liable here in the same way as she would have been liable according to the law of Spain. Possibly this would get rid of the question, and the Court of Admiralty would have jurisdiction to enforce against the ship an equitable

(1) Law Rep. 1 C. C. 161.

1876

THE M. MOXHAM.

right arising from this contract, by virtue of which the ship was released from its liability under the jurisdiction in Spain.

It was properly conceded by Mr. Benjamin in his argument, that the present question must be tried exactly in the same way as if it were being tried in Spain, and he admitted that he could not successfully argue in support of the decision of the court below unless he could make out that it would be the duty of the Spanish court, if the action had proceeded there, to apply what he called the principles of English law to the case. The principle of English law applicable to the case, according to him, is, that the master and the crew of the vessel, being the servants of English owners, are, by the English law, themselves liable, and, upon the principle of respondeat superior, make their principals responsible for their negligence. And further, that they carry with them this doctrine, so that it extends to every foreign country and every foreigner who is brought in any way into contact with them, whether by way of contract or tort, in which the masters and servants as the agents of the owner are concerned.

No authority was cited for that proposition, and I am really unable to follow the principle. One can understand that a contract between master and servant, or the relations between principal and agent, may affect a contract made by the agent quâ agent with foreigners, that is to say, it may affect the nature and extent of his agency; but the liability of one man to answer for the acts of another in matters of tort seems a thing which cannot be carried by the agents into a foreign country. If I take my coachman to France, and he in driving my carriage injures a carriage in France, I do not take with me the law of respondeat superior so as to make me liable. It seems to me that the law of the country in which we are trying the question does not apply, but it is the law of the place where the act is done which does apply. Now, it is the law of Spain, according to the allegation, that where the wrongful act is done by a servant of this particular kind, the owner of the ship has not that wrong imputed to him, and that the rule of respondeat superior does not apply so as to make him answerable for that which was, in fact, the wrongdoing of his servants. If that be so, why is he not entitled to the benefit of the Spanish law?

It is settled that if by the law of the foreign country the act is lawful, or is excusable, or even if it has been legitimized by a subsequent Act of the legislature, then this Court will take into consideration that state of the law; that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here.

I ventured to observe in the course of the argument that, though we may speak of the thing as doing wrong, it is the man who does the wrong, and if he is not a wrongdoer according to the law of the country where the wrong was done, that is to say, if he is not answerable for the wrong of his servant, he is not amenable to the Spanish law for the wrong done, and it is our duty to give him the benefit of the Spanish law in this case.

MELLISH, L.J. I am of the same opinion. A great many cases were cited in the argument, but they almost all relate to actions respecting either wrongs to personal property or actual personal injuries. Now, the law respecting personal injuries and respecting wrongs to personal property appears to me to be perfectly settled that no action can be maintained in the courts of this country on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed and also wrongful by the law of this country. The cases of *The Halley* (1) and *Phillips* v. *Eyre* (2), together with the other cases in conformity with them, seem to be conclusive upon the subject.

10 QBD 524

In the case of *The Halley* (1) it was a collision with a ship in foreign waters. By the law of the foreign country the ship was liable, and the owners were liable as owners of the ship, but by the law of England the ship and owners would not be liable, because there was a pilot on board, who was taken compulsorily on board, and who was navigating the ship, and the negligent act was his act. Upon that it was held that notwithstanding the ship and the owners were liable according to the law of the country where the act was committed, yet inasmuch as they were not liable by the

(1) Law Rep. 2 P. C. 193. (2) Law Rep. 6 Q. B. 1.

1876

THE M. MOXHAM.

law of England, no action could be maintained against them. Then, in the case of *Phillips* v. *Eyre* (1), which was an action brought for a wrong committed in a foreign country, it was decided that, as the liability of the defendant had been taken away by the law of the country where the act was committed, no action could be brought in this country. Therefore, if that is the rule respecting personal wrongs and respecting wrongs to personal property, it seems to me, à fortiori, that it must be the rule respecting wrongful acts to real property in a foreign country. Whether the rule as to wrongful acts to real or immovable property in a foreign country does not go still further and prevent an action being brought at all is a question which it is not necessary to determine in this case, because, having regard to the consent of the parties and the agreement that has been entered into, no such objection to the jurisdiction could be taken in this case. But it appears to me beyond all question that if the rule before mentioned is applicable to personal property and wrongs, it à fortiori must be applicable to damage done to real property in a foreign country.

But then it is said that though that is the general rule, yet here the act was not done in the foreign country, because the wrongful act was committed on board an English ship on the high seas. I agree that as to acts done on board a ship itself, no doubt the English ship carries the English law with it, but I am not convinced that it carries the English law with it with reference to wrongful acts done by guiding an English ship against a pier which is part of the foreign country. It is unnecessary to consider what would be the rule in a case where the ship was outside the three-mile limit and had fired a gun which caused damage within the foreign territory, though I do not think that the case would present any more difficulty. Here the ship was really within the Spanish dominions at the time when it committed the wrong. As Mr. Clarkson put it, she was coming into a Spanish port, where she had no right to go except by licence given to her by the law of Spain, and where she was bound to obey the law of that country while she was there. In that position she comes into contact with that which is stated in the plea to be part of the soil of Spain, and this brings the case within the general rule that no action can

(1) Law Rep. 6 Q. B. 1.

be brought in this country in respect of an alleged wrongful act committed in a foreign country which act is not wrongful by the law of that country.

Then it was said by Mr. Benjamin that although that is perfectly true as a general rule, and although he admits that, if the act itself was not by the law of Spain considered to be wrongful, no action could be brought in this country, yet inasmuch as it is by the law of Spain considered a wrongful act as far as the master is concerned, therefore the question whether the master alone is liable, or the ship and the owners also are liable, is not to be governed by the law of Spain but by the law of England.

I do not think any sufficient authority has been cited for that proposition, and it appears to me that it would make a further distinction in the law which would have very inconvenient results. There is a well-known distinction between substantive law and mere procedure. If it could be proved that this question of liability turned upon mere procedure under the law of Spain, then that law would not be regarded in this country. But it appears to me that the rule that a particular person is not to be liable, although somebody else possibly may be liable, is a part of the substantive law of the country where the act is committed; and therefore if by the substantive law of the country where the act is committed a defendant is not liable, then he would be discharged altogether. If there is any authority wanted for that proposition, it is laid down by Baron Parke in the case of *General Steam Navigation Co.* v. *Guillou.* (1) That was a case of an injury done on the high seas by a French ship, and there he says: "The injury complained of is averred to have arisen on the high seas, out of the jurisdiction of England, and not to have been committed by the defendant personally, but by a third person, who was master of a French vessel, the defendant being a French subject. So far, the plea is free from obscurity. If the defendant was not liable for the acts of that other by that law which is to govern this case, he has a good defence to the action; and for the defendant it is contended that the plea means to aver that by the law of France he was not liable for those acts, but that a body established by the French law, and analogous to an English cor-

(1) 11 M. & W. 877, 895.

1876

THE M. MOXHAM.

poration, were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant and not the servant of the individuals composing that body; and if such be the true construction of this plea, we are all strongly inclined to think that there is a good defence to this action."

I am of opinion that that rule applies to this case, and that if by the law which is to govern the case the defendant is not liable for the act of the master, he has a good defence to the action; and if, therefore, the law which is to govern the case is the Spanish law, the defendant is not liable by that law, and has a good defence to the action.

BAGGALLAY, J.A. I am of the same opinion. The learned judge of the Court below seems to have, in his judgment, relied very much upon the decision in the case of *Reg.* v. *Anderson* (1), but that case appears to me clearly distinguishable from the case with which we have now to deal. In that case the argument proceeded much more upon the question whether Anderson was liable, inasmuch as he was a foreigner upon an English ship in French waters, than upon the question whether he would have been liable if he had been an Englishman; but their lordships thought that, having entered into articles to serve on board an English ship, so long as he remained on board that ship he was in the same position as an English subject would have been. In that case the offence was fully and entirely committed in the vessel upon which Anderson and the wounded man were, and I am unable to see any analogy between that case and the present.

The learned judge of the Court below referred to several other cases, and, amongst them, to the case of *The Halley* (2), which he said appeared to follow the same course as *Reg.* v. *Anderson.* (1) There again I am unable to agree with the learned Judge. Where a suit is instituted in an English court in respect of a wrong committed in a foreign country, it is not sufficient for the plaintiff to shew that there is, according to foreign law, a liability on the part of the defendant, but he must also shew a liability according to English law.

In the case of *The Halley* (2), inasmuch as by English law there

(1) Law Rep. 1 C. C. 161. (2) Law Rep. 2 P. C. 193.

is no liability on the owners if they have taken a pilot by compulsion, it was held not open to the plaintiff to claim or receive damages, on the ground that by the law of Belgium the owners were not relieved from responsibility because they by compulsion employed a pilot.

The principles seem to be laid down very clearly and distinctly in the case of *Phillips* v. *Eyre.* (1) Mr. Justice Willes, in delivering the judgment of the Court, there says: "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Therefore, in *The Halley* (2), the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done."

If English law alone were applicable to this case, there would have been an actionable wrong just as if the act had been committed in England; but then the question remains, whether it would have been justifiable by the law of the place where it was done. Now, for the purpose of the present proceedings, we are bound to presume that, according to the law of Spain, there is no liability or responsibility on the part of the owners of the ship for the acts of the master and crew. It appears to me, therefore, that, by applying the principles enunciated in *Phillips* v. *Eyre* (1), we are able to arrive at the conclusion, in the present case, that the law of Spain, and not the law of England, applies.

The defendants in this case moved, on the 28th of March, 1876, before the judge of the Admiralty Division, for a commission to be issued to Madrid, to examine witnesses on behalf of the defendants. In support of this motion affidavits were made by the clerk of the defendants' solicitors that in his judgment it was necessary that various advocates should be examined at Madrid on be-

(1) Law Rep. 6 Q. B. 1. (2) Law Rep. 2 P. C. 193.

1876

THE M. MOXHAM.

half of the defendants as to the law of Spain; that it would save expense if the commission was issued, and that there would be great difficulty in getting advocates of eminence to come over to this country to be examined. The plaintiffs made an affidavit that it would be necessary to send solicitors and counsel to Madrid, and that the expense would be very great.

Sir Robert Phillimore refused to direct the issue of a commission being of opinion that it would be better to have the witnesses examined in court.

The defendants appealed.

May 3. *Watkin Williams, Q.C., J. C. Mathew,* and *E. C. Clarkson,* for the defendants. The defendants have no means of compelling such advocates as they will require to come here and give evidence. The evidence can be more satisfactorily taken in Spain, and the expense of bringing advocates here will be as great as that of sending solicitors and counsel to Spain. At law such a commission would be issued almost as a matter of course; in *Barry* v. *Barclay* (1) there was very little proof of the necessity for a commission.

G. Bruce, and *R. E. Webster,* for the plaintiffs, were not called upon.

JAMES, L.J. The learned judge, to whom this application was made, thought it would be more satisfactory to have the witnesses examined in Court. If there is any real difficulty in obtaining the attendance of competent Spanish advocates, an application can be made to us; but the learned judge was of opinion—and we agree with him—that there can be no difficulty in getting competent advocates to attend and tell us what is the law of Spain on this point. They will probably come here at a less expense than would be occasioned by sending counsel and solicitors to Spain. This appeal must be dismissed with costs.

BAGGALLAY, J.A., and LUSH, J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *C. C. Ellis & Co.*

Solicitors for defendants: *Parker & Clarke.*

(1) 15 C. B. (N.S.) 849.

[IN THE COURT OF APPEAL.]

1876
Feb. 5.

THE SISTERS. (7186.)

Collision—Improper Navigation—Third Ship—Contributory Negligence—Appeal—Witnesses.

Where one ship is by the improper navigation of a second ship compelled to alter her course, and so does damage to a third ship, the ship which compelled the alteration of course is liable for the damage; and that liability remains if the damaged ship was not actually negligent, even though by taking another course she might have avoided the collision.

Pow 283

THIS was a cause of damage. Three barges—the *Sisters*, the *Alfreda*, and the *Volunteer*—were, on the 15th of October, 1874, coming up Half-way Reach, in the river Thames. A steamer called the *Thames* was going down the river, and altered her course so as to run into and sink the *Alfreda*, and to damage the *Volunteer*. The *Volunteer* instituted a cause of damage (No. 7003) in the High Court of Admiralty against the *Thames* steamer, and that cause was dismissed on the ground that the *Thames* had been obliged to alter her course in order to avoid collision with the third barge, the *Sisters*, which barge had, by improperly starboarding her helm, brought herself across the bows of the *Thames*.

The present suit was then instituted by the *Alfreda* against the *Sisters*. It was heard before Sir Robert Phillimore, judge of the High Court of Admiralty, assisted by two of the Elder Brethren of the Trinity House. At the hearing witnesses were examined in Court, and the following judgment was delivered:—

July 8, 1875. SIR ROBERT PHILLIMORE. This is a case of collision which happened in the afternoon of the 15th of October, 1874, in the entrance to Half-way Reach, in the river Thames, and off that point that is called Jenning-tree Point. The tide at the time was running about half flood, and from three to four knots an hour. The vessel which brings the action on the present occasion is a sailing barge called the *Alfreda*, of 40 tons register. She had three persons on board; two of them unfortunately were drowned at the time of this collision.

There is a peculiarity in this case which I will mention. The

1876

THE SISTERS.

suit is not brought against the actual wrong-doer, but it is brought against the vessel which caused the actual wrong-doer to do the wrong, and that vessel is the *Sisters*, a sailing barge of about 42 tons. Now I must observe that this is not the first time that this case has been before the Court, because on the 29th of January a vessel called the *Volunteer*—which was side by side with the *Alfreda*, and practically considered by the Court then and now as being almost one vessel—brought her action against the *Thames*, and the *Thames* was dismissed, on the ground that the wrong that she did she was forced to do—namely, that she was compelled by the *Sisters* to starboard, and that that starboarding caused her to run into the *Volunteer* after cutting through the *Alfreda*.

It has been very truly remarked by Dr. Spinks, who appears on behalf of the *Sisters* to-day, that the *Sisters* is not concluded by that judgment. She was not heard then; she had no witnesses produced; she was neither plaintiff nor defendant, and she has a right to be heard to-day.

The first question which the Court has to decide is, whether the steamer was compelled by the *Sisters* to starboard. [His Lordship then commented on the evidence, stating that he believed some witnesses and disbelieved others, coming to the conclusion that in the hurry and alarm the *Sisters* starboarded her helm and threw herself across the bows of the steamer.]

The next defence is that the *Thames* herself, the steamer, was improperly navigated. I have already expressed my opinion upon that point. I do not think she was, nor do the Elder Brethren of the Trinity House think she was, improperly navigated.

The third category of the defence is that the *Alfreda* herself, by improper conduct, either caused entirely or contributed to this collision. When it is remembered that from the time the *Thames* had put her helm a-starboard, as compelled to do by the action of the *Sisters*, to the time of her running into the *Alfreda*, not more than two or three minutes elapsed at the very most, the Elder Brethren agree with me in thinking that, whether the *Alfreda's* manœuvre was proper or improper in porting instead of starboarding (we by no means say it was the latter), but whether it was proper or improper, it cannot be holden in any fair sense to have contributed to this collision.

I, therefore, am of opinion that the collision was caused by the starboarding of the steamer; that the starboarding of the steamer was caused by the improper manœuvre of the *Sisters* in crossing the bows of the steamer; and, therefore, that the real wrong-doer in this case is not the steamer which dealt the blow, but the barge, the *Sisters*, which caused that blow to be dealt; and therefore I must pronounce that the *Alfreda* has made out her case, and that this collision was owing to the improper navigation of the *Sisters*.

From the decree made in pursuance of this judgment the *Sisters* appealed.

1876. Feb. 5. *Dr. Spinks, Q.C., Butt, Q.C.*, and *Gainsford Bruce*, for the *Sisters*.

The Admiralty Advocate (*Dr. Deane, Q.C.*) and *E. C. Clarkson*, for the *Alfreda*, were not called upon.

[As to the liability of a third ship, *Trinity House* v. *Romney Marsh* (1) was referred to.]

JAMES, L.J. I am of opinion that no sufficient ground has been shewn for supporting this appeal.

The question is whether *The Sisters* was the actual cause of the mischief done. There is abundant evidence in support of the contention that she did cause that mischief. There is, no doubt, counter-evidence, and although I cannot say what I might have decided if I had tried the action in the first instance, I can see no sufficient ground for disturbing the finding of the Court below. The case was heard by the learned judge of the Admiralty Court, assisted by nautical assessors, and they, proceeding very much upon the ground of the credibility of witnesses, arrived at the conclusion that the cause of this collision was the improper starboarding of the *Sisters*, and there is nothing to shew that the finding was against the evidence.

(1) Law Rep. 5 Ex. 204; 7 Ex. 247. See also *The Venus*, 1 Pritch. Adm. Dig. 129; *The Hibernia*, 4 Jur. (N.S.) 1244; *The Industrie*, Law Rep. 3 A. & E. 303. And as to an appeal on a question of evidence, *The Singapore*, Law Rep. 1 P. C. 378.

1876

THE SISTERS.

The other question raised before us is whether, it having been found that the *Sisters* was the cause of the collision, there was any contributory negligence on the part of the *Alfreda*. To disentitle the *Alfreda* to her right of recovery, there must have been contributory negligence, that is to say, an act of negligence on her part contributing to the collision. Therefore, the question is whether there was any act on the part of the *Alfreda* which would come within the meaning of the word "negligence." It is not enough to shew that the *Alfreda* did some act, or did not do some act, by reason of the commission or omission of which the collision actually occurred. It is impossible to hold that the *Alfreda* is guilty of negligence because she might have avoided the collision if she had done something other than she actually did, unless that omission was negligent, and I am of opinion that she has not been shewn to have been guilty of negligence. I am, therefore, of opinion that the appeal must be dismissed with costs.

MELLISH. L.J., and BAGGALLAY, J.A., concurred.

MELLOR, J. I am of the same opinion. I feel the greatest difficulty, sitting here in the Court of Appeal, in dealing with a mere question of evidence. We are not assisted by nautical assessors, and we therefore cannot judge whether the evidence as it stands ought, from a nautical point of view, to have led to a different conclusion. I do not see how the Court can in such a case upset a judgment where the matter has been fully dealt with with reference to the credibility of witnesses in the Court below.

Appeal dismissed.

Solicitors for appellants: *Deacon, Son, & Rogers.*
Solicitors for respondents: *Keene & Marsland.*

THE POLYMEDE. (H. 9.)

1876
Jan. 12.

Practice—Judgment by Default in Admiralty Actions in rem—Judicature Act, 1875, *Order XIII.—Order of* 1*st December,* 1875.

Proceedings by default in Admiralty actions in rem are regulated by the practice which prevailed in the High Court of Admiralty immediately before the passing of the Judicature Act, 1875.

2 PD. 4

THIS was an action in rem instituted on the 3rd of November last on behalf of certain mortgagees of certain shares of the vessel *Polymede* to enforce their mortgage security. The writ was duly served, and the vessel placed under arrest in the suit, but no appearance was entered on behalf of any person as defendant, and the plaintiffs accordingly on the 17th of November filed in the registry an affidavit of service and a statement of the particulars of the plaintiffs' claim.

On the 28th of December the plaintiffs entered final judgment for the amount shewn by the statement of particulars and costs pursuant to the Judicature Act, 1875. (1)

Jan. 11. *E. C. Clarkson* moved the judge in Court to decree the appraisement and sale of the mortgaged shares of the *Polymede.*

Cur. adv. vult.

Jan. 12. SIR ROBERT PHILLIMORE. This is the first case in which the question has had to be considered by the Court, whether the rules of Court which form part of the Judicature Act, 1875, apply to an action in rem where the proceedings are by default. The question is whether the proceedings by default in actions in rem are regulated by the rules of Order XIII. in the schedule annexed to the Judicature Act, 1875, or by the rules formerly prevailing in the Court of Admiralty. Order XIII. in the schedule of the Judicature Act, 1875, is headed "Default of appearance," and consists of ten rules, of which the tenth and last is subdivided into a great many sections relating exclusively to the proceedings in Admiralty actions in rem. It is to be presumed,

(1) See Law Rep. 3 A. & E. 612.

1876

THE POLYMEDE.

therefore, that the framers of the rules did not intend the first nine rules of this order to be applied to Admiralty actions in rem. Now, at a meeting of the judges of the Supreme Court held on the 1st of December last in pursuance of the Judicature Act, 1875, the 10th rule of Order XIII. was annulled, and no other rule was substituted for it. In these circumstances it has been suggested to me that the 5th rule of the order has been rightly followed in this case, but I am of opinion that that is a position which cannot be successfully maintained. In the first place, as I have already said, the insertion of the rule which has now been annulled, shews that the framers of the rules did not consider that the previous rules of the order were sufficient for the purpose of regulating proceedings in rem, and, in fact, it is obvious that neither the 5th rule nor any other of the rules of Order XIII., which remain in force, contain provisions sufficiently comprehensive to apply to all cases of proceedings in rem by default, and in the second place, the 18th section of the Judicature Act, 1875, provides that all rules and orders of Court in force in the Admiralty Court at the time of the commencement of the Act, except so far as they are expressly varied by the rules in the first schedule to the Act, or by Rules of Court made by Order in Council before the commencement of the Act shall remain and be in force.

In my judgment the effect of the annulling of the 10th rule of Order XIII. is to revive the practice previously existing in the High Court of Admiralty with regard to proceedings by default in rem, and I must therefore pronounce that such practice must be followed. I shall make no order on the motion, but I shall direct the costs of the motion to be costs in the cause.

Solicitors for plaintiffs: *Ingledew, Ince, & Greening.*

[IN THE ARCHES COURT OF CANTERBURY.]

1875
Oct. 20.

THE OFFICE OF THE JUDGE PROMOTED BY DURST *v.* MASTERS.

Pleading—Responsive Plea pleading Illegality of Wooden Cross removed out of Parish Church without the Sanction of a Faculty—Ornaments of the Church.

8 PD 170

A moveable wooden cross was placed on a retable at the back of and immediately above the communion table in a parish church without the authority of a faculty, and remained so placed under the sanction of the vicar of the parish until it was removed out of the church by one of the churchwardens, who in removing the cross acted without any lawful authority.

The vicar of the parish having promoted a cause of office against the churchwardens, and brought in articles in which he prayed that the churchwarden might be admonished to restore the cross, the defendant in one of the articles of a responsive plea objected to the restoration of the cross on the grounds, 1, that it had been placed in the church without a faculty; 2, that it was so placed as to appear to form one of the ornaments of the communion table, and was not a lawful church ornament; 3, that its restoration would offend the conscientious feelings of many of the parishioners of the parish:—

Held, on motion to oppose the admission of the responsive plea, that the article which set forth these objections must be struck out.

THIS cause was promoted in virtue of letters of request signed by the chancellor of the diocese of Norwich, by the Rev. John Durst, vicar of the parish and parish church of St. Margaret, in the borough of King's Lynn and diocese of Norwich, against Saddleton Masters, a parishioner, and one of the churchwardens of the same parish, for having in the month of May last, against the will of the said vicar, and without any lawful authority in that behalf, effected an entrance into the said parish church of St. Margaret by means of a private key thereof in his possession, and removed a wooden cross then standing upon or near the retable in the said church from its place and out of the said church. (1)

The material portions of the articles were to the following effect:—

1. The promoter, the Rev. John Durst, clerk, is the vicar of the parish of St.

(1) It appeared by the recitals in the letters of request that a further charge of having and using a private key of the church without lawful authority, &c., had been made against the defendant, but this charge was not insisted upon in the articles.

SC post 373.

1875

DURST v. MASTERS.

Margaret, in the borough of King's Lynn, in the county of Norfolk, and diocese of Norwich.

2. The defendant, Saddleton Masters, is a parishioner, and one of the churchwardens of the said parish.

3. On Friday, the 28th of May, 1875, and thenceforth until it was removed as hereafter stated, there was standing or being upon or near the retable in the said church of St. Margaret a wooden cross, which had been so placed and which then stood and was under the authority and by the directions of the promoter.

4. On Friday, Saturday, or Sunday, the 28th, 29th, or 30th of May, 1875, but on which of such days the promoter cannot better specify, the defendant effected an entrance into the said church by means of a private key thereof in his possession, and removed or caused to be removed the said cross from its place upon or near the said retable, and further out of the said church, against the will of the promoter, and without any lawful authority in that behalf, and in contempt and violation of the laws ecclesiastical. The defendant has never restored the said cross.

7. All and singular the premises are true, and the proctor for the promoter prays that on legal proof being made the defendant be pronounced to have violated the laws ecclesiastical, and admonished not to offend in future, and further admonished to restore the said cross so illegally removed by him as aforesaid, and condemned in the costs of this suit.

The admission of the articles was not opposed, and the proctor for the defendant, having given a negative issue thereto, brought in a responsive plea, in which he alleged in substance as follows:—

1. That he admits the averments contained in the 1st, 2nd, and 3rd articles given in by the promoter.

2. As to the 4th article, he denies that the defendant effected an entrance into the said church by means of a private key of the church, for he says that he effected such entrance by means of a key in his custody as churchwarden of the said parish, and which was delivered to him by the parish sexton on his last accession to the office of churchwarden, and that by the custom of the parish the churchwardens have heretofore retained in their custody keys of the church as well as the vicar. That save and except as aforesaid he admits the averments in the said 4th article.

4. That the defendant objects to an order being made as prayed by the promoter for the restoration of the said cross so removed by the defendant, as in the 4th article alleged, on the following grounds:—

(1.) That the said cross, which is moveable and made of wood, was on or about the 27th day of May, 1875, introduced into the parish church by the promoter, and placed by him or under his authority, where it remained until removed by the defendant, on a shelf or retable at the back of and immediately above the communion table in the said church, without a faculty or other lawful authority.

(2.) That the said moveable wooden cross, before the same was removed by the defendant, was placed on the said shelf or retable which is fixed immediately

behind and above the communion table of the said church, and was so placed as to appear to form one of the ornaments of the communion table. That such moveable cross, by reason of its not being one of the ornaments of the church prescribed in the rubrics, or subservient in or subsidiary to the performance of the services of the church, is not a lawful church ornament, and cannot lawfully be replaced on the said retable.

(3). That the restoration of the said moveable wooden cross on the retable would offend the conscientious feelings of a large number of the parishioners of the said parish who are members of the old church of England.

5. That in so far as the defendant may have offended against the laws ecclesiastical in the matters alleged in the 4th article, he submits to the judgment of the Court.

6. That the proctor for the defendant prays the Court to refuse to admonish the defendant to restore the said moveable wooden cross so removed by him, and he further prays the Court to condemn the promoter in the costs incurred by the defendant in this suit in resisting an order for the restoration of the said moveable wooden cross.

Oct. 20. *W. G. F. Phillimore* appeared on behalf of the promoter, and opposed the admission of the responsive plea. The 4th and 6th articles are clearly irrevelant, and would be inadmissible on that ground alone. The 2nd paragraph of the 4th article is, moreover, bad in substance. It cannot successfully be contended since the decisions of the Judicial Committee of the Privy Council in *Westerton* v. *Liddell* (1), and *Liddell* v. *Beal* (2), that the cross in this case is an illegal ornament. [He was then stopped on this point.] The first paragraph of the 4th article is quite immaterial, for if the defendant removed the cross without lawful authority, the court must order it to be restored, without inquiring into the question of whether it was legally placed in the church. It has always been held that averments, such as are contained in the 3rd paragraph of the 4th article, are inadmissible as matter of defence.

Dr. Tristram, on behalf of the defendant, in support of the responsive plea. It has never yet been decided that a cross could lawfully be placed in the position where the cross in this case stood before its removal by the defendant. In the case of *Liddell* v. *Beal* (2), the cross objected to was placed on the sill of the east window in the church of St. Barnabas, and the Judicial Committee only decided in effect that, as a cross so placed was an architectural decoration, there had been no breach of the monition

(1) Moore's Special Report. 1 Jur N.S. 1178

(2) 14 Moo. P. C. 1. 1 Jur N.S. 1178

1875

DURST v. MASTERS.

which had previously issued in the case of *Westerton* v. *Liddell.* (1) In fact, the only question which could come before the Court was whether this monition had been complied with. As to the allegations in the 1st and 3rd paragraphs of the 4th article, it has always been competent for parties to plead matters which might guide the Court in the exercise of its discretion.

Phillimore, in reply, referred to Phillimore's Ecclesiastical Law, vol. i. p. 921; *Elphinstone* v. *Purchas.* (2)

SIR ROBERT PHILLIMORE. This is a question of the admissibility of a responsive allegation. The articles in the cause were propounded by the vicar and incumbent of the parish and parish church of St. Margaret, in the borough of King's Lynn, and they state that the defendant is a parishioner and one of the churchwardens of the parish; that on a certain day, Friday, the 28th of May, 1875, and thenceforth, until it was removed, there was standing or being upon or near the retable in the said church of St. Margaret, a wooden cross, which had been so placed and which there stood and was under the authority and by the directions of the promoter. The articles then charge that on a particular day the defendant effected an entrance into the church and removed this cross, and that the defendant on this and other occasions, offended against the laws ecclesiastical, by using a private key to the church, and going in without permission; but the gist of the alleged offence is the removing this wooden cross by the defendant's own authority. The defence set up is, that he did not effect an entrance by means of a private key, but by means of a key which had been in his custody as churchwarden, and I may take it as admitted, so far as the entrance into the church is concerned, that in fact no objection was raised on that point. The 4th article of the responsive plea objects to the restoration of the cross so removed by the defendant on the following grounds. [His lordship here read the first ground of objection set out in the 4th article of the responsive plea.]

There is no question at all that the original putting up of this cross without a faculty was not a legal act on the part of the incumbent.

(1) Moore's Special Report. 1 Jur N.S. 1178

(2) Law Rep. 3 A. & E. 66. 1 Jur N.S. 1170

The second part of the 4th article of the responsive plea sets up [His lordship here read the second ground of objection contained in the 4th article of the responsive plea]. The third paragraph of the 4th article charges [His lordship here read the third ground of objection contained in the 4th article of the responsive plea].

There are two propositions of law as to which there is no dispute at all, one I have already stated, namely, that it was not legal on the part of the incumbent to put up this cross without a faculty from the ordinary. The other and the converse proposition, which has not been disputed to-day, is, that it was not legal on the part of the churchwarden to remove the wooden cross so put up, without a faculty. It has been contended that both these propositions may be true, but that the third proposition, namely, that the wooden cross ought to be put back in its position is not a necessary consequence. Now I have always understood the law to have been distinctly laid down upon this point on many occasions, namely, that as a general rule—of course there may be exceptional cases—anything put up in a church and improperly removed is to be put back again before the question of its legality or illegality is raised.

It is said in this case the illegality of the ornament is apparent, as I understand the argument, and that the Court ought not to make an order that an illegal ornament be replaced, although it was improperly taken down. It is important to ascertain as accurately as possible what the ornament is, and I learn from the responsive allegation that it is a wooden moveable cross on the shelf or retable at the back of and immediately above the communion table. This is a matter which we all know has undergone great consideration in certain cases which are now taken to contain a principle which cannot be gainsaid.

The first case was the case of *Liddell* v. *Westerton* (1), in which their lordships of the Privy Council laid down what they considered to be the difference between ornaments or ornamenta, and decorations. The words are these:—"Their lordships, after much consideration, are satisfied that the construction of this rubric which they suggested at the hearing of the cause is its true meaning, and that the word 'ornaments' applies, and in this rubric is

(1) Moore's Special Report, 156.

1875

DURST v. MASTERS.

confined, to those articles the use of which in the services and ministrations of the church is prescribed by the Prayer Book of Edward the Sixth. The term 'ornaments' in ecclesiastical law is not confined as by modern usage, to articles of decoration or embellishment, but it is used in the larger sense of the word 'ornamentum' . . . ." (1)

Therefore, according to this definition, all the articles used in the performance of the services and rites of the church are ornaments. Now the article in question does not appear to me to be one which is used in the performance of the services and rites of the church, and therefore not to be an ornament in the technical sense in which their lordships construed that word in the case of *Liddell* v. *Westerton.* (1)

But the case of *Liddell* v. *Westerton* (1) was carried a step further, because in the matter of St. Barnabas' Church an application was made to the Lords of the Privy Council to carry into execution their monition, which it was said had been disobeyed, and disobeyed in the matter of allowing the moveable cross to remain. In that case the chapel-warden applied to the Court, and alleged that the monition was still in part uncomplied with in the following particulars: First, the metal cross which at the time the monition had been issued was standing in the church or chapel attached to the super-altar, or stone altar, had since been placed on the sill of the great eastern window above the communion table; secondly, that the table substituted for the stone altar was not flat but had an elevation placed thereon. The answer was, that the monition had been complied with; and, that the metal cross which was formerly standing, attached to the ledge at the back of the stone altar, was then placed on the sill of the centre compartment of the eastern window in the chancel of the church, 5 ft. 10 in. above the surface of the communion table, and wholly disconnected therewith. When their Lordships had to consider whether their monition was complied with or not, Lord Justice Knight Bruce said: "Now there was formerly a cross which stood upon the stone table, and was, in a sense at least, affixed to it; which was objected to, and, as it appears, properly objected to. The stone table has been altogether re-

(1) Moore's Special Report, 156.

moved, and with it the cross; but the cross has been placed in another part of the church or chapel, not in any sense upon the table which has been substituted for the stone table, nor in any sense in communication, or contact, or connection with it. It remains in the church as an ornament of the church; and their lordships think, if the word may respectfully be applied to such a subject, not an unusual or improper ornament; . . . ." (1) and they pronounce that their monition has not been disobeyed. His lordship there seems to use the word "ornament" of the church as distinct from ornaments of the service, and as synonymous with the word "decoration," which their lordships in the judgment in *Westerton* v. *Liddell* (2) had distinguished from "ornament."

It is, therefore, perfectly clear that in the opinion of their Lordships a moveable wooden cross, not upon the table, but above the table at a certain distance (it does not seem very much to matter whether three feet or five feet), might be considered a lawful architectural decoration or ornament of the church as distinguished from ornaments of the service. I confess I am unable, after listening to the argument of Dr. Tristram, to distinguish this case in principle from the one which is now before me.

There is another portion of this allegation which is objected to, and that is, that the restoration of this cross on the retable "would offend the conscientious feelings of a large number of the parishioners of the said parish who are members of the old Church of England." I have known the attempt made upon several occasions to obtain admission of such a pleading as this, and, I think, it has been invariably refused by my predecessors in this chair, upon, as it appears to me, the very sensible ground, that if the Court were to admit pleadings of this description, it would have to take the sense of the parish on both sides, which would lead to endless litigation, and, after all, could not affect the proposition of law whether the matter inquired into was or was not legal.

Upon the whole, I am of opinion that those portions of the articles of the responsive plea which have been objected to must be struck out for the reasons which I have stated. I am unable to distinguish this case in principle from the cases of *Liddell* v.

(1) *Liddell* v. *Beal*, 14 Moo. P. C. 1, 13. (2) Moore's Special Report.

1875

DURST v. MASTERS.

Westerton (1) and *Liddell* v. *Beal.* (2) I therefore shall direct that the responsive plea may stand, the articles 4 and 6 being omitted. The 4th and 6th articles I reject with costs.

If it is necessary I will give leave to appeal.

Proctor for promoter: *Brooks.*
Proctor for defendant: *Jennings.*

Oct. 20.

[IN THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY WYNDHAM *v.* COLE.

Pleading—Control of the Incumbent of a Parish over Organ.

7 App Cas 242

The organist of a parish church, although appointed and paid by the vestry, is guilty of an ecclesiastical offence if he plays on the organ immediately before, or during, or immediately after divine service, contrary to the directions of the incumbent.

In a criminal suit promoted by the vicar of a parish against the organist of his parish church for playing on the organ of the church contrary to the directions of the vicar, the defendant filed a responsive plea, in which it was alleged that by the ecclesiastical law the incumbent of a parish had not an unlimited right to control the use of the organ, or to put a stop to the ordinary musical services of the church, in an arbitrary manner, without reasonable or proper cause, or the sanction of the ordinary, and that the promoter, in prohibiting the defendant from playing on the organ, had acted without such sanction, and without reasonable or proper cause. The responsive plea further alleged in effect that the defendant had been appointed organist, and was paid a salary by the vestry, and that the majority of the parishioners were anxious that the customary performance on the organ should continue.

On application on behalf of the promoter, the Court rejected the responsive plea as inadmissible.

THIS case came before the Court by virtue of letters of request signed by the Chancellor of the diocese of Bath and Wells. The letters of request, which were accepted by the Dean of Arches (3), on the 16th of April last, requested that Henry Cole, an inhabitant and parishioner of Yeovil-cum-Preston, in the diocese of Bath and Wells, should be cited to answer to certain articles to be administered to him at the voluntary promotion of the Rev. Edmund Wyndham, vicar of the said parish. The said Henry

(1) Moore's Special Report. (2) 14 Moo. P. C. 1, 7.
(3) The Right Hon. Sir Robert Phillimore.

Cole appeared to defend the suit, and articles were brought in, the material portions of which were substantially as follows:—

1. By the ecclesiastical law of this realm the incumbent of a church has the right and duty of performing divine service therein, and has (subject to the authority of the ordinary) the right to control and direct the use and management of the organ in such church, in and in connection with such service, and that it is illegal for other persons, without any lawful authority, knowingly to make use of and play upon such organ, in or in connection with such service, contrary to the express wish and directions of such minister, or in any wise to obstruct and interfere with such minister in respect of such right of control and direction.

2. The defendant, on the evening of Sunday, the 28th of February, 1875, did without any lawful authority, and unlawfully and contrary to the express wish and direction of the promoter, play a certain voluntary or piece of music on the organ in the parish church of the said parish immediately before the performance of divine service, and in the presence of the congregation then assembled, and in a manner connected with the said service, and without any break or interval separating such playing from such service.

3. The defendant, on the evening of Sunday, the 24th of January, 1875, and—(here followed an enumeration of other dates in 1875), did, without any lawful authority, &c., play a certain voluntary or piece of music on the organ, in the parish church of the said parish, immediately after the performance of divine service, and before the congregation had wholly left the church, and without any break, &c.

4. The defendant, on Sunday, the 14th of February, 1875, without any lawful authority, and unlawfully did obstruct and interfere with the promoter in respect of his right to control and direct the use and management of the organ in the said parish church, in connection with divine service, thereby knowingly resisting his directions as to the use of the organ in divine service in the said church, and then using the same in a manner contrary to such directions.

On the 24th of July the articles were admitted to proof, and a negative issue having been given thereto, a responsive plea was filed on the 22nd of September. The first paragraph of the responsive plea was substantially in the following terms:—

1. By the ecclesiastical law of the realm the incumbent of a church has not an unlimited right to control the use and management of the organ, or to put a stop to the ordinary musical service in such church, in an arbitrary manner without reasonable and proper cause or the sanction of the ordinary. On the occasions referred to in the articles, when the promoter prohibited the defendant from playing on the organ in the said church, he did so without the knowledge or sanction of the ordinary, and without any reasonable or proper cause.

The responsive plea in the 2nd, 3rd, and 4th articles alleged that the parishioners had at their own costs erected the organ in the year 1838, and from that time had repaired the same; that in April, 1838, the defendant was appointed organist by a vote of

1875

WYNDHAM v. COLE.

the vestry, and had since continued to act as organist, with the approbation and consent of the parishioners, at a fixed yearly salary paid by the churchwardens; and that the defendant had been accustomed to perform on the organ a short voluntary before the commencement and at the termination of divine service, and to accompany the singing during the course of divine service. After these allegations the responsive plea proceeded to set out—in paragraph 5—that on the 24th of January, 1875, the promoter, without any reasonable or proper cause, sent to the defendant a notice forbidding him to play on the organ in the parish church, and warning him that if he insisted in playing a voluntary before or after divine service he would commit an ecclesiastical offence, and be made the subject of articles; and continued in substance as follows:—

6. Such notice was not issued with the knowledge or sanction of the bishop of the diocese, nor has the said bishop at any time authorized the suspension of the musical services of the said church. Nor did the defendant, at any time previous to the institution of these proceedings, offer to refer the matters in dispute between him and the defendant to the arbitration of the said bishop.

7. The notice above referred to was not issued, nor these proceedings commenced by the promoter, with the knowledge or approbation of the parishioners of the parish; on the contrary, the majority of such parishioners have always been, and still are, willing and anxious that the customary performance of music on the organ, during and after the termination of the services, should be continued as heretofore in their parish church, and that the defendant should act as organist therein.

The responsive plea then pleaded a meeting of the parishioners in vestry and certain resolutions passed at such meeting with reference to the proceedings against the defendant and the alleged action of the vicar in the matter. The 8th and 9th articles contained averments to the effect that the defendant had not played on the organ "after the commencement of or before the termination of Divine service" since he received the notice from the promoter forbidding him so to do. The 10th article of the responsive plea was in the following terms:—

The defendant denies that by reason of the premises set forth in the articles, or on any other grounds, he has incurred ecclesiastical censures.

The proctor for the promoter, on the 1st of October, filed a notice that the admission of the responsive plea was opposed, and the question of its admissibility now came on to be argued before the Court.

A. Charles, and *Benjamin Shaw*, for the promoter. There is no one article in the responsive plea either relevant or material, and nothing is averred therein which can constitute in law any defence to the suit, or even have any bearing on the question of costs. It is not necessary to contend here that the incumbent of a parish has an unlimited right to put a stop arbitrarily and without cause to the customary musical services in his church, but it is undoubtedly law that any orders he may give with respect to such services must be obeyed; the propriety of his conduct can be inquired into by the ordinary alone: Phillimore Ecclesiastical Law, vol. i., p. 929; *Hutchins* v. *Denziloe* (1); *Wilson* v. *M'math* (2); *Ritchings* v. *Cordingley*. (3) The whole plea is in fact open to the objection sustained by Lord Stowell in the case of *Hutchins* v. *Denziloe*. (1) It has been decided in the case of *Elphinstone* v. *Purchas* (4), that a procession which took place immediately, and without any break or interval, before divine service commenced, was illegal. Similarly in the case of *Sumner* v. *Wix* (5), the use of incense subsidiary and preparatory to the celebration of the Holy Communion was condemned. It is, therefore, no answer to the charges contained in the articles that the defendant has discontinued the unauthorized playing of the organ during the celebration of divine service. He ought also to have discontinued playing both before and after service. The case of *Ritchings* v. *Cordingley* (3) is an authority that in cases analogous to the present, where the rights of the incumbent only come in question, the Court will disregard any expression of the opinion of the parishioners as irrelevant.

Bayford, on behalf of the defendant. It is submitted that it has never yet been decided that the incumbent of a parish can of his mere motion, and without the previous sanction of the ordinary, alter the customary mode in which the musical services of his parish church have been conducted. In such matters the wishes of the parishioners ought to have some weight. The allegation that the orders of the incumbent as to the use of the organ during the celebration of divine service have been obeyed, is mate-

(1) 1 Hagg. Cons. 170.
(2) 3 Phillim. 67.
(3) Law Rep. 3 A. & E. 113.
(4) Law Rep. 3 A. & E. 66.
(5) Law Rep. 3 A. & E. 58, 66.

1875

WYNDHAM v. COLE.

rial as shewing that if an offence against ecclesiastical law has been committed by the defendant it is not of such a grave character.

[In answer to the learned judge, he stated that the defendant was desirous, if the Court should be of opinion that the responsive plea ought to be rejected, that the case should be decided on this motion.]

SIR ROBERT PHILLIMORE. I am of opinion that the responsive allegation must be rejected with costs. Upon the admission of the articles I stated what I believed to be the law as to the control and responsibility of the minister in the circumstances of the present case, namely, that where there is an organ in a church or chapel of the Church of England it is not competent to the organist to play on it at any time in defiance of the directions of the minister. Now the defendant has given in a responsive allegation, but I do not consider that it sets up any valid defence either on the law or the facts. If the minister did arbitrarily forbid the defendant to play on the organ, I think the defendant might have appealed to the ordinary, but, in any event, he should have obeyed the directions of the minister provisionally, and until the ordinary directed the right course for the minister to follow. The responsive allegation pleads a resolution of the parishioners in vestry, but it is clear that all such averments are irrelevant to the issues raised in the suit. Rejecting as I do the responsive allegation, and the counsel for the defendant being willing to have the case decided without its again coming before the Court, my duty is clear, and I must admonish the defendant not to infringe the ecclesiastical law in the manner complained of in the articles. The defendant must be condemned in the costs of the suit.

Proctor for promoter: *Coote.*

Proctor for defendant: *Skipwith.*

THE JUNO. (J. 92.)

1876
Feb. 3.

*Damage—Trinity Outport—Compulsory Pilotage—*17 & 18 *Vict. c.* 104, *s.* 370 *—Costs.*

Pilotage is compulsory within the Falmouth district.

THIS was an action of damage instituted on behalf of the owners of the barque *Indus* against the Swedish brig *Juno.* The statement of claim alleged, in substance, that the *Indus* on the 12th of December last was brought up in Falmouth harbour, off St. Mawes Castle, and at 8 p.m. on the next day was riding with both anchors out at the same place, with a bright anchor light duly exhibited, when the *Juno* entered Falmouth harbour under sail, improperly let go her anchor at a short distance from the *Indus,* and came into collision with her, doing considerable damage.

The statement of defence admitted the allegations in the statement of claim to be true, and alleged that at the time of the collision the *Juno* was by compulsion of law in charge of a pilot duly licensed for the district in which she was being navigated, and that the collision, and the damage proceeded for, were caused by the negligence of such pilot, and not by any fault of the *Juno,* her master, or crew.

The cause came on to be heard on the 3rd of February last on oral evidence before the judge, assisted by two of the Elder Brethren of the Trinity Corporation. At the hearing the defendants began. They called witnesses to prove that the collision was caused by the fault of the pilot alone. They also called one of the clerks of the Trinity Corporation, who proved that the pilot in charge of the *Juno* at the time of the collision had at that time a licence from the Trinity House to act as a Trinity House pilot within the Falmouth district; and that the Trinity Corporation had been in the habit of licensing pilots for the Falmouth district previously to the year 1854.

Milward, Q.C., and *E. C. Clarkson,* for the plaintiffs, referred to ss. 370 and 376 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and submitted that the defendants had not proved that pilotage was compulsory within the port of Falmouth, no sufficient evidence having been given to prove that the Falmouth

1876

THE JUNO.

district was a district for the appointment of pilots within which no particular provision was made by any Act of Parliament or charter.

Butt, Q.C., W. G. F. Phillimore, and *Stubbs,* on behalf of the defendants. It has been shewn that the Trinity House had been accustomed to license pilots for the Falmouth district before the passing of the Merchant Shipping Act, 1854, and it is for the plaintiffs, if they can, to prove that the Falmouth district is not one of the Trinity outport districts as defined by the Act.

[SIR ROBERT PHILLIMORE. I am of opinion that the defendants have proved primâ facie that the Falmouth district, within which the collision occurred, was a Trinity outport district as defined by s. 370 of the Merchant Shipping Act, 1854.]

Evidence was then called on behalf of the plaintiffs with a view to establish that the pilot was not exclusively to blame for the collision.

The Court, after hearing the evidence, was of opinion that the collision was caused by the fault of the pilot, and ordered the suit to be dismissed.

Butt, Q.C., referred to *The Royal Charter* (1), and applied that the suit should be dismissed with costs.

E. C. Clarkson submitted that the question whether the plaintiffs should be condemned in costs was in every case a question of discretion to be determined with reference to the peculiar circumstances of each case.

SIR ROBERT PHILLIMORE. I look upon it as an established rule that where in a cause of damage the only defence raised by the defendants is that their vessel is exempted from liability on the ground that a pilot was in charge by compulsion of law, and the plaintiffs are aware that this is the sole question in the case, and have come into Court to dispute it and have failed, they must be condemned in costs. I think I expressed in substance the same opinion in the case of *The Royal Charter* (1); but, at any rate, I have always considered that the conclusion I have stated ought to be followed as a principle.

Solicitor for plaintiffs: *Thomas Cooper.*

Solicitors for defendants: *Stokes, Saunders, & Stokes.*

(1) Law Rep. 2 A. & E. 362.

HAWKS *v.* HAWKS AND FENWICK.

1876
Feb. 29.

Matrimonial Suit—Death of Petitioner—Taxation of Costs—33 & 34 *Vict. c.* 28.

After a decree absolute had been made for a dissolution of his marriage with the respondent, together with an order for costs against the co-respondent, but before such costs had been taxed, the petitioner died:—

Held, that his representative was entitled under the provisions of the statute 33 & 34 Vict. c. 28, s. 19 to enforce such order for costs against the co-respondent.

THIS was a suit for dissolution of marriage by reason of the adultery of the respondent and co-respondent, in which a decree absolute had been made six or seven years ago. The decree condemned the co-respondent in the costs of the suit. After the termination of the proceedings the co-respondent went to Borneo, but had lately returned to this country. No order had ever been obtained for the taxation of the costs, and the petitioner had since died, having made his last will and testament, in which he appointed George Crawshay executor, who took probate thereof.

Feb. 15. *Bayford* applied to the Court on behalf of the representative of the petitioner for leave to proceed with the taxation of the costs. As the petitioner had obtained an order in the suit for the payment of costs against the co-respondent, it is fit that such costs should be taxed; it will be for after consideration whether the representative of the petitioner can enforce the order against the co-respondent.

Searle, for the co-respondent, opposed the motion, first, on the ground that the executor of a deceased petitioner is not in a position to ask for such an order, and, secondly, by reason of the delay which had occurred in this case: *Grant* v. *Grant and Others.* (1)

Cur. adv. vult.

Feb. 29. THE JUDGE ORDINARY (President). This is a case in which, in a suit for dissolution of marriage, a decree absolute had been made, and the co-respondent was condemned in costs. The co-respondent went abroad, and the costs were not taxed against

(1) 2 Sw. & Tr. 522; 31 L. J. (P. M. & A.) 174.

1876

HAWKS v. HAWKS.

him. Subsequently the petitioner died, and his representative now seeks to enforce in some way against the co-respondent, who has returned to this country, such decree for costs. I do not think that the death of the petitioner should stand in the way of my enforcing the order. The only point discussed before me was the effect of the death of the petitioner in abating the suit; but I find in a statute, 33 & 34 Vict. c. 28, to which my attention was not called by counsel on either side, provisions which have a direct bearing on the question before me. It is a statute relating to attorneys and solicitors, and in the 19th section it is enacted that whenever any decree or order shall have been made for payment of costs in any suit, and such suit shall afterwards become abated, it shall be lawful for any person interested under such decree or order to revive such suit, and thereupon to prosecute and enforce such decree or order, and so on from time to time as often as any such abatement shall happen. This statute was passed to remedy a difficulty which arose by reason that in the common-law courts a suit could not be revived for the purpose only of enforcing an order for costs. The words of the statute are very general, and I know no reason why they should be limited in their operation, or not made applicable to all Divisions of the High Court. I shall therefore direct that the representative of the petitioner be at liberty to enforce the order for costs made against the co-respondent.

Solicitors for petitioner: *Maples, Teesdale, & Co.*
Solicitor for co-respondent: *Savile R. Hoyle.*

LE SUEUR *v.* LE SUEUR.

1876
March 9.

Matrimonial Suit—Jurisdiction—Domicil of Wife deserted by her Husband—No Domicil, either real or acquired, of the Respondent in this Country.

A woman, having been deserted by her husband, who went to reside in the United States of America, acquired a bonâ fide domicil in England, and instituted a suit for dissolution of marriage against him by reason of his adultery and desertion. The original place of domicil of marriage and of matrimonial cohabitation of the parties was in Jersey, and the adultery proved was committed there. The husband had never had or acquired a domicil in England:—

Held, that even if the petitioner, without a sentence of judicial separation, could acquire a distinct domicil in this country, she could not make her husband amenable to the lex fori of her new domicil.

THIS was a suit for dissolution of marriage brought by the wife by reason of the respondent's adultery and desertion. The parties were married in the island of Jersey on the 26th of August, 1863, and finally separated on the 24th of August, 1872, when the respondent proceeded to the United States of America, where he has continued to reside. The citation and petition were personally served upon him, but he did not enter an appearance.

Keogh appeared for the petitioner.
Gorst, Q.C., and *Bowen*, for the Queen's Proctor.

SIR R. J. PHILLIMORE. When this case came before me in the first instance it appeared that the parties had been married in Jersey, which was also the place of their matrimonial domicil; that the wife, who is the petitioner, was resident in England, that the husband was in America neither resident nor domiciled in England. I entertained grave doubts as to the jurisdiction of the Court, but I was much pressed to hear the case upon the merits, in order, as the witnesses were all present, to save an increase of the expense, which would otherwise be incurred by the petitioner, and I consented to this course. After hearing the evidence and the argument of counsel for the petitioner, I came to a clear conclusion that the adultery and desertion of the husband were fully proved. The husband, the defendant, has not appeared. The proper evidence was given that he had been served

S C [illegible] pt 2PD.79.Ca

1876

LE SUEUR
v.
LE SUEUR.

with a citation and with a certified copy of the wife's petition at No. 73, Washington Avenue, in the city of Chelsea, in the state of Massachusetts, in the United States of America, on the 6th day of March, 1873. The case then stood over for argument as to the jurisdiction of the Court, and I thought it one of so much importance that I invoked the assistance of the Queen's Proctor, in order that the point might be fully argued before me by counsel on both sides. I am very glad that I did so, because I have greatly benefited by the able arguments on both sides which have been addressed to me. The only facts which it is necessary to state for the limited purpose of considering the question of jurisdiction are the following:—The parties were married in the island of Jersey on the 26th of August, 1863; they cohabited in that island until the 24th of August, 1872, on which day the husband deserted his wife and children and went to the United States of America, where he has since remained, and where, as I have already observed, he was duly served with notice of these proceedings. The law of Jersey does not allow the dissolution of the marriage contract, but it does allow a separation à mensâ et thoro. The first point raised on behalf of the petitioner was, that, inasmuch as Jersey was in the diocese of Winchester, it must be deemed to be in England, and therefore within the scope of the Divorce Act, 1857 (20 & 21 Vict. c. 85); but an examination of the ecclesiastical law applicable to Jersey, especially the canons passed in the reign of James I., satisfies me that the Bishop of Winchester had no original jurisdiction as to matrimonial causes in Jersey; and upon the whole I am of opinion that Jersey is as much exempt from the operation of the Divorce Act as Ireland or Scotland. The operation of the Divorce Act is confined to England.

The second and really important question in the case is whether the domicil of the wife in England (for I think it may be assumed that her bonâ fide domicil, so far as the law allows her to establish one, is in this country) has founded the jurisdiction of this Court in a suit for a divorce in vinculo against her husband. It may well be that for other purposes than this, for matters affecting herself alone, the desertion by her husband, which must be considered as a proved fact in the case, has rendered it competent to her to establish a domicil of her own. I am not aware that any

judicial decision has as yet gone to this length, but there is much to be said in favour of the proposition both on principle and analogy, and it receives some support from the dicta of Lord Cranworth in the case of *Dolphin* v. *Robins.* (1) First, he considers the effect of a judicial decree à mensâ et thoro. "It may be," he says, "that where there has been a judicial proceeding enabling the wife to live away from her husband, and she has accordingly selected a home of her own, that home shall, for purposes of succession, carry with it all the consequences of a home selected by a person not under the disability of coverture." This doctrine, I may observe, is supported by the case, *Williams* v. *Dormer.* (2) "I should add," Lord Cranworth then continues, "that there may be exceptional cases, to which even without judicial separation the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony, and been transported. It may be that in these and similar instances, the nature of the case may be considered to give rise to necessary exceptions. I advert to them only to shew that the able argument of Sir H. Cairns has not been lost sight of. It is sufficient to say that in the appeal now before the House no such case of exception is to be found." These words were uttered in 1859. The doctrine that the domicil of the wife is necessarily that of the husband must surely admit of some exceptions, such as those referred to by Lord Cranworth. It is founded, indeed, upon the duty of the wife to live with her husband, but also on the presumption that he will be faithful to his marriage vow. If he disregard that obligation, if he commits an offence which entitles her either to a judicial separation or a divorce, her legal duty to live with him must undergo considerable modification, and in some cases entirely cease, for it is possible her continued cohabitation with him might disentitle her to the relief to which his misconduct uncondoned had entitled her. The Courts of the United States of North America seem to have laid down these positions, first, that the wife may have a domicil distinct from that of her husband, and, secondly, that the Courts of the bonâ fide domicil of either party may entertain a suit for a divorce.

(1) 7 H. L. at pp. 416, 419.

(2) 2 Roberts. Eccl. 505.

5 Jun. U.S. 1876-5

1876

LE SUEUR v. LE SUEUR.

The Scotch Courts have holden that a permanent domicil is not necessary to found their jurisdiction in a suit for divorce brought by either party, but that the delictum of adultery must have been committed in Scotland. Upon the whole I am disposed to assume, in favour of the petitioner, the correctness of the opinion that desertion on the part of the husband may entitle the wife, without a decree of judicial separation, to choose a new domicil for herself, and in coming to that conclusion I am aware that I am going a step further than judicial decisions have as yet gone.

The question remains: Is it competent to the wife to make the husband amenable to the lex fori of her new domicil? The judgments delivered since the passing of the Divorce Act as to the jurisdiction of the English Divorce Court over persons who were not subject to it by the lex contractus, or the original, or the acquired lex domicilii of the parties are, I think, conflicting. I have carefully examined all the judgments directly or indirectly bearing upon these important points. I will refer to some of them. In *Deck* v. *Deck* (1) there was a petition for dissolution of marriage at the suit of the wife by reason of the husband's adultery and bigamy. The citation was served upon the respondent in the United States, North America. There was no appearance by him. On the evidence it appeared that the husband, a natural-born English subject, was at the time of the service of the citation resident in the United States, North America. In that case the Judge Ordinary said, "It appeared in evidence before us that the parties were married at Norwich in 1844. In 1848 a deed of separation was executed, and they ceased to live together. Soon afterwards the respondent went to America, and became domiciled there. In 1853 he intermarried in America with Louisa Halpin, and by her had one child. She afterwards, in the Supreme Court of the State of New York obtained a decree of nullity of marriage on the ground of his having a wife living at the time when the marriage ceremony was performed. The citation out of this Court was served on the respondent personally in America. On this evidence it was quite clear that the respondent had been guilty of bigamy and adultery; but a doubt was entertained whether the Court had jurisdiction to adjudicate on a

(1) 2 Sw. & Tr. 90; 29 L. J. (P. M. & A.) 129.

petition presented against a party domiciled in America. In that case it was holden that, notwithstanding the husband's change of domicil, the Court had jurisdiction to dissolve the marriage. In 1859 in *Tollemache* v. *Tollemache* (1) the full Court decreed, at the prayer of the husband, a dissolution of a marriage contracted first at Gretna Green in Scotland, and then in England. After the marriage the parties principally cohabited in Scotland, and the wife, the respondent, contended that the Court had not jurisdiction, and that a Scotch decree of divorce already made was valid. The original domicil of the husband was certainly English; and a jury to whom, somewhat strangely perhaps, the question of domicil was submitted, found that the husband still continued his English domicil. The full Court held that they could not recognise the Scotch divorce of a domiciled Englishman, and decreed a new sentence of divorce. In the same year the case of *Yelverton* v. *Yelverton* (2) occurred. In that case the wife brought a suit for restitution of conjugal rights. The Judge Ordinary, finding that the marriage was Scotch, that the husband never had a residence in England, and had not been guilty of misconduct to his wife in England, though the husband had been personally served in Scotland with a citation and a copy of the petition, pronounced, after a careful examination of the cases on the subject of jurisdiction in the former Ecclesiastical Courts, against the jurisdiction of the Court of Divorce laying down as principles of law (1.) that the domicil of the wife was that of the husband; and (2.) that actor sequitur forum rei. In 1860 occurred the case of *Callwell* v. *Callwell* (3), in which the husband was domiciled in Ireland, and had only a temporary abode in England at the date of filing the petition; and the wife appeared, and submitted to the jurisdiction of the Court. The full Court dissolved their marriage, which had been celebrated in Ireland, on the ground of adultery committed by the wife in England and on the continent. In *Simonin* v. *Mallac* (4) the Court held that it had jurisdiction to inquire into the validity of a marriage in England between foreigners domiciled abroad at the time of the marriage. In *Bond* v. *Bond* (5),

(1) 1 Sw. & Tr. 557; 28 L. J. (P. M. & A.) 2.
(2) 1 Sw. & Tr. 574. 6 Jur N.S. 24
(3) 3 Sw. & Tr. 259.
(4) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97. 6 Jur N.S. 561,
(5) 2 Sw. & Tr. 93; 29 L. J. (P. M. & A.) 143.

1876

LE SUEUR v. LE SUEUR.

an Englishwoman by origin, married in England to an Irishman, petitioned for a dissolution of the marriage on the ground of adultery and cruelty. The husband was served with a citation in Ireland, but did not appear. The Court said, "According to this evidence, the petitioner was English, and therefore had a right, according to the 27th section of the Divorce Act, to present her petition; but the respondent appears to have had a residence in Ireland, from which, if that evidence stood alone, it might be inferred that his origin was Irish, and Ireland, for the purpose of this question, must be treated as a foreign country. If the evidence on this point had been so cogent as to compel the Court to take notice that the respondent was not English, we must have decided whether or no the Court can, consistently with the principles of international law, assume a right to adjudicate upon a petition presented against a foreigner, who is served abroad with a citation to which he does not appear. But the marriage was solemnized in England, and the respondent afterwards lived with his wife at various places in England, and although he has not appeared and submitted to the jurisdiction of this Court, he has not contested it, and we do not find evidence of so conclusive a nature as to compel us to deal with him as an Irishman. The case is, therefore, the same as *Deck* v. *Deck* (1), and our decree is that the marriage be dissolved, and the respondent be condemned in costs."

I say nothing of the case of *Forster* v. *Forster* (2), as it is uncertain whether the subject of jurisdiction was fully argued before the Court. In *Brodie* v. *Brodie* (3) the full Court came to the conclusion that a husband petitioner, bonâ fide resident in England, not casually or as a traveller, can institute a suit in the Divorce Court, and this doctrine was accepted and enforced in *Manning* v. *Manning*. (4) In that case the husband was resident in England when he instituted his suit, but the Court held that his bonâ fide residence was still in Ireland, the domicil of origin, and declined to entertain the suit. The marriage, I presume, was in Ireland. In *Shaw* v. *Attorney General* (5) the peti-

(1) 2 Sw. & Tr. 90; 29 L. J. (P. M. & A.) 129.

(2) 3 Sw. & Tr. 144; 31 L. J. (P. M. & A.) 185.

(3) 2 Sw. & Tr. 259; 30 L. J. (P. M. & A.) 185.

(4) Law Rep. 2 P. & M. 223.

(5) Law Rep. 2 P. & M. 156.

tioner had obtained a divorce in a foreign country where her husband did not reside. No notice of the proceedings were personally served upon him. The citation was by advertisement, which did not reach him or come to his knowledge. Everything took place behind his back. As the learned judge observed: "A judgment so obtained has the incurable vice of being contrary to natural justice"; and he added: "In no case has it ever yet been decided that a man can, according to the laws of this country, be divorced from his wife by the tribunals of a country in which he has never had either domicil or residence." In *Wilson* v. *Wilson* (1) the parties had married and cohabited in Scotland, and in that country the wife had committed adultery. The husband came to England, and after some years instituted a suit. The Court decided that he had abandoned his Scotch and acquired an English domicil, and exercised its jurisdiction. The Court observed: "Whether any residence in this country short of domicil, using that word in its ordinary sense, will give the Court jurisdiction over parties whose domicil is elsewhere, is a question upon which the authorities are not consistent." In this observation no doubt the learned judge (Lord Penzance) had in his mind the judgment of the House of Lords in *Shaw* v. *Gould.* (2) In that case there had been an English marriage between two English persons, who, however, never lived together; but the husband committed adultery, and some years afterwards consented to go to Scotland to found jurisdiction against himself, and did so, and a Scotch Court pronounced a decree of divorce à vinculo. Their lordships held that a Scotch marriage duly celebrated between the divorced wife and an Englishman, who was thenceforth domiciled in Scotland, did not give to the children of their union the character of lawfully begotten, so as to enable them to succeed to property in England, for that the Scotch divorce had not dissolved the English marriage. Lord Chelmsford said: "I think that *Lolley's Case* (3) cannot be pressed as an authority beyond this extent, that the Scotch Court has no power to dissolve an English marriage, where the parties are not domiciled in Scotland, but have only gone there for such a time as would render them amenable to the jurisdiction of the Scotch

(1) Law Rep. 2 P & M. 435. (2) Law Rep. 3 H. L. 55.
(3) Russ. & Ry. 236.

1876

LE SUEUR
v.
LE SUEUR.

Court. It certainly did not decide (as the Vice-Chancellor supposed), nor has any other case decided, that the law of this country did not recognise the right or authority of any Court, whether domestic or foreign, to dissolve an English marriage for any cause or for any pretext whatever. On the contrary, *Warrender* v. *Warrender* (1) appears to me to be a direct authority in support of the exercise of such a jurisdiction by the Scotch Courts. It was not because in that case the husband's domicil was Scotch at the time of the English marriage that the Court assumed the jurisdiction which was upheld by the House of Lords, but on account of the Scotch domicil which he had at the time he raised the action of divorce against his wife, which attracted her domicil, and brought her constructively within the jurisdiction. There can be no distinction in principle, as to the power of a Scotch Court to dissolve an English marriage, between the case of a domicil existing at the time of such marriage and a permanent domicil afterwards acquired. (2) Lord Westbury said: "It must be admitted that there has been a series of decisions in the Scotch courts to the effect that a permanent domicil of parties is not necessary to found a jurisdiction in the Scotch tribunals to pronounce a decree of divorce à vinculo between parties who have been married in England or any other foreign country, and that if the defendant in any such suit had been resident for forty days in Scotland, it is sufficient to subject him to the jurisdiction of a Scotch tribunal in a suit for divorce. It would, however, seem to be the law of Scotland that if the divorce be sought on the ground of adultery, the adultery must have been committed in Scotland. The whole reasoning of the judges in the Scotch cases is founded upon the right of the Scotch Courts to redress any wrong committed by either of the spouses, if the act be done within the territory of Scotland, and that if divorce be sought on the ground of a personal wrong committed within the jurisdiction of a Scotch Court, it is the right of the party who suffers the wrong to have that remedy which the law of the country affords. Such reasoning, however, although it may be good for maintaining the validity of the Scotch divorce in Scotland, cannot be required to be accepted by the tribunals of another country. The result is that a sentence

(1) 2 Cl. & Fin. 546.

(2) Law Rep 3 H L 76.

of divorce under such circumstances may be binding in Scotland, although of no validity in the territory of England. The inconvenient consequences of this state of law are obvious, and have been frequently exposed with great force, particularly by Lord Brougham in his speech in giving judgment in the case of *Warrender* v. *Warrender* (1); but this disgraceful anomaly can only be removed by the legislature (2). In conclusion, I must observe that upon this difficult and important subject neither the judgments of English tribunals, nor the opinions of accredited jurists, nor the practice of Christian states are in perfect harmony. The contract of marriage is often and truly said to be one juris gentium, inasmuch as it is a contract, not only concerning private rights, but deeply affecting public order. It is a question both of status and of contract. Perhaps the variety of opinion to be found in the authorities proceeds from the circumstance that some have considered it more exclusively under the former, and some more exclusively under the latter, character, but be that as it may, I must follow, to the best of my ability, the principles of English decisions. In the case before me the wife is suing her husband, not in the tribunal of the place of his original domicil, or of the marriage (according to the law of which, it is not immaterial to remark, the bond was indissoluble), or of the delictum, or of his residence, or of his acquired domicil, but in a tribunal to which he has never been subjected by any act of his own. I think that, according to the judicial exposition of the law in England by authorities which I am bound to follow in these circumstances, this Court has no jurisdiction over the husband in this suit, and I must, therefore, dismiss it.

Solicitor for petitioner: *W. H. Roberts.*

(1) 2 Cl. & Fin. 546.

(2) Law Rep. 3 H.L. 88.

1876
March 21.

KENNAWAY *v.* KENNAWAY.

*Testamentary Suit—Citation to see Proceedings—Heir at Law and Devisees of Real Estate—*20 *&* 21 *Vict. c.* 77, *s.* 61—*Judicature Acts*, 1873–1875, *Order XVI., Rules* 12, 13.

The practice as to citations to see proceedings heretofore in use in the Probate Court has not been altered by the Judicature Acts and the rules therein contained; and therefore in order that a decree in a testamentary suit may bind the heir at law or devisees of real estate, a citation should be taken out against them under the provisions of 20 & 21 Vict. c. 77, s. 61, notwithstanding the directions of the 13th Rule, Order XVI., Judicature Acts, 1873–1875.

Mark Kennaway, of Hoopern House, Exeter, and Bag Park House, Devonshire, died on the 16th of September, 1875. The plaintiff Walter Kennaway propounded a will and two codicils of the deceased with certain alterations contained therein, he being the nephew of the testator, and an executor substituted by one of such alterations. The defendant is the Rev. Warwick Bampfylde Kennaway, the son and only next of kin of the deceased, the only person entitled in case of intestacy to his personal estate, and his heir at law. He had entered an appearance in the action. The alterations of the testamentary papers effect a complete change in the disposition of the reversionary interest in certain real estate, and in the residuary real and personal estate, which the testator has sought to entail in a very strict manner, and the plaintiff has been advised that the devisees and other persons whose interests are affected by such alterations ought to be cited to see proceedings.

C. A. Middleton moved accordingly. A difficulty has arisen as to the future practice in these cases, whether the parties interested in the real estate should be cited under 20 & 21 Vict. c. 77, s. 61, or whether their names should be added as those whose presence before the Court may be necessary, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action before it in accordance with the provisions of Order XVI., Rule 13 (Judicature Acts, 1873–1875). As the method of citing the heir at law and devisees was prescribed

by statute, it is very questionable whether it can be rescinded by implication only.

March 21. SIR J. HANNEN (President). This was an action by the plaintiff, as executor, against the defendant, the next of kin of the deceased, in which the plaintiff propounded a will with certain alterations appearing in it. The defendant has entered an appearance. The plaintiff now applies for leave to cite to see proceedings several devisees whose interests are affected by the alterations, and who are out of the jurisdiction of the Court. The question arises whether this is the proper mode of bringing these persons before the Court, or whether the plaintiff should proceed by writ of summons. The question turns on the construction to be put on Order XVI., Rules 12 to 15 inclusive. By the 12th Rule it is enacted that, subject to the provisions of the Act and the rules, in all probate actions the rules as to parties heretofore in use in the Court of Probate shall continue to be in force. The effect of this rule is that it remained, as before, unnecessary that the persons now sought to be cited should be made plaintiffs or defendants in the suit. But by the practice of the Probate Court, inherited from the Prerogative Court, an executor in the position of the present plaintiff had the power of citing persons interested in the litigation as next of kin or legatees to see proceedings; and by the 61st section of the Probate Act, 1857, a similar power was given of citing the heir at law, devisees, and other persons having or pretending an interest in the real estate affected by the will. This did not make the persons so cited parties to the suit, either as plaintiffs or defendants, but it gave them the opportunity of appearing and taking part in the proceedings, either on the side of the plaintiff or defendant, as their interests might incline them, or they might abstain from appearing and allow the suit to be determined in their absence. This practice remains in force unless it has been altered by some provision of the Judicature Acts or the rules. The only provision which can be supposed to effect such an alteration is that of the 13th Rule of Order XVI., by which it is enacted that the Court or judge may at any stage of the proceedings order that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence

1876

KENNAWAY v. KENNAWAY.

before the Court may be necessary, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. The object of this provision was to give to the High Court the power which the amalgamated Courts, or some of them, did not possess, of bringing before it as plaintiffs or defendants persons whose presence was necessary in order to do complete justice. But this is in no way inconsistent with the continued exercise of the power which parties in the Probate Court (subject to the rules of that Court) possessed of citing persons whom it was desired to bind to see the proceedings, not in the character of plaintiffs or defendants, but simply as persons cited as interveners if they thought fit to become so. It appears to me, therefore, that the power given by the 13th Rule is an addition to, and not a substitution for, the practice which has hitherto prevailed with regard to citing persons to see proceedings, and that that practice must continue in all respects as before. In the present instance I give leave to the plaintiff to cite the several persons named as prayed.

Solicitor: *J. R. Burchett.*

April 4.

IN THE GOODS OF ASTOR.

Testamentary Papers—General American Will—Special Will relating to British Funds—Separate Executors—Incorporation.

An American, by a will and codicils, disposed of his property generally, and by a second will, in which he named separate executors, of moneys he had invested in the British funds. He expressed a distinct wish that the British will should take effect as a separate testamentary disposition of property independent of and disconnected from his general will:—

Held, that it was unnecessary to incorporate the American will, which was very bulky, in the English probate, but that an authenticated copy of the American will and codicils should be filed in the registry, and a note be added to the English probate to the effect that such copy had been so filed.

WILLIAM BACKHOUSE ASTOR, of New York, United States of America, died on the 24th of November, 1875. He executed a will, bearing date the 17th of June, 1856, and nine codicils thereto, by which he disposed of the bulk of his property. These papers

were exceedingly lengthy, extending over three hundred folios, and were proved in the proper office at New York. The testator also executed another will, dated the 27th of June, 1862, with three codicils thereto, dated respectively the 12th of April, 1864, the 19th of January, 1865, and the 29th of May, 1869. The will commenced, "I, William Backhouse Astor, of the City of New York, merchant, in order to make the disposition hereafter expressed of the amount which at my decease I shall hold or be entitled to in the public debt of the United Kingdom of Great Britain and Ireland, commonly called Three per Cent. Consols, do devise and bequeath in manner following:" He disposed of the whole of the British Consols, and appointed his sons, John Jacob Astor and William Astor, and his friend Alexander Gillespie, of London, or in case of his death or declining, Robert Gillespie in his place, to be executors; and he concluded: "I declare and direct that this is to be deemed a special and limited will, applicable to the said British Consols only, and not to affect nor to be affected by any other testamentary paper by me made or to be made unless expressly referring to this property and this will. I revoke all other dispositions of this British debt." The third codicil, dated the 29th of May, 1869, contained the following clause: "In case, from any legal difficulty or impediment, my said special will or disposition of June 27, 1862, as varied by the codicils thereto, cannot receive probate or take effect as a separate testamentary disposition of my said British Consols, independent of and disconnected from my general last will and testament, which bears date June 17th, 1856, and to which there are several codicils, then I will and declare that the said special will or disposition of June 27th, 1862, in connection with and as varied by the several codicils thereto, including this one, shall take effect by way of further codicil to my said general will of June 17th, 1856; and to that end I do hereby republish the said separate will and its two codicils, all of which are hereunto annexed in connection with this codicil, and as varied by the said successive codicils in connection with this codicil, to stand in case of need by way of further codicil to my said general will. But I will and declare that in any case the provisions of the said special will and codicils as they now stand, giving effect to the codicils in their

1876

IN THE GOODS OF ASTOR.

order, shall take effect absolutely and wholly unaffected and uncontrolled by anything contained in my said general will or the codicils thereto, unless it be as to the appointment of executors by my general will. But I declare that I, of course, did not and do not intend to constitute or appoint either the said Robert Gillespie or Alexander Gillespie to be an executor of my said general will." The only mention in the general will concerning the testator's property in England occurs in the first and second codicils. In the first codicil the testator says: "And I declare that any moneys, funds, or stocks which may be owned by me in England or France are not included in the provisions of my will and codicil, which shall not apply to the same in any manner." And in the second codicil he says: "To avoid misapprehension I declare that I expressly limit the application of this and my former codicil and of my will to estates, real and personal, within the United States of America." The only property of the deceased in England consisted of Three per Cent. Consols, amounting in value to about 400,000*l.*

Searle, on behalf of one of the executors named in the English will, moved for probate of that will, and the three codicils thereto, without the incorporation in the probate of the general will and its codicils. Even although the costs need not be considered in this case, there would be great inconvenience from such incorporation by reason of the bulkiness of the general will. [He referred to *In the Goods of the Marquis of Lansdowne* (1); *In the Goods of Dundas* (2); *In the Goods of Sibthorp.* (3)]

SIR J. HANNEN (President). I am of opinion that I ought to grant this application. The question of incorporation in the probate of separate documents has frequently been a subject of consideration, and, I may say, a troublesome matter both to myself and my predecessors, in carrying out the jurisdiction I have now to exercise. I endeavoured to lay down the principles which should guide me in these cases *In the Goods of Lord Howden* (4), in which I held that where an English will ratifies and confirms a

(1) 3 Sw. & Tr. 194; 32 L. J. (P. M. & A.) 121.

(2) 32 L. J. (P. M. & A.) 165. 9 Jur NS. 360

(3) Law Rep. 1 P. & M. 106.

(4) 43 L. J. (P. & M.) 26. 22 WR 711.

foreign will, it is right that the latter should be incorporated in the probate. In the present case, however, the testator has carefully used the clearest and strongest language to indicate his intention of keeping the English property separate from the American, and for that purpose has made the English will, which does not purport to ratify or confirm the American will, but merely expresses his desire that, if the two cannot be kept totally distinct, the English will shall be treated as a codicil to the American one. I have come to the conclusion that his wishes need not be disappointed, and that there is no reason why I should insist on the incorporation of the American will in the English probate. I think, however, it is right in granting probate of the English will that some such reference as that suggested by counsel should be made to the fact that there is an American will in existence, so that any person having an interest in the matter should be put upon its track. An affidavit, therefore, must be filed in the registry verifying copies of the American will and codicils, and, as I am told is the practice sometimes in cases of this kind, a note must be appended to the probate that such an affidavit has been filed, so that the probate will carry with it upon its face a notice to all persons interested that they may see in the registry the documents which are referred to in it. I think that, as it is not desired that the American will shall be included in the probate, I am not bound to insist upon it against the wish of the English executor, and the course I have pointed out will prevent any mischief arising in the matter.

Solicitors: *Bischoff, Bompas, & Bischoff.*

1876
March 13.

[IN THE COURT OF APPEAL.]

SUGDEN AND OTHERS *v.* LORD ST. LEONARDS AND OTHERS.

Probate—Lost Will—Presumption of Revocation—Secondary Evidence of Contents—Interested Witness—Declarations of Testator—Contents of Will not completely proved—Hearing of Cause by Judge of Probate Division without a Jury—Re-hearing—Appeal—20 & 21 *Vict. c.* 77, *ss.* 35, 39, 61, 62, 63—*Probate Court Orders of July*, 1862, *Rules* 47, 49, 52, 59, 60—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 22, 49—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 18—*Rules of Supreme Court, Order XXXIX., Rule* 1; *Order LVIII., Rules* 2, 14.

The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence.

Brown v. *Brown* (8 E. & B. 876) approved and followed.

Declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents (Mellish, L.J., dissenting as to declarations made after the execution of the will).

Quick v. *Quick* (3 Sw. & Tr. 442) overruled.

The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached.

When the contents of a lost will are not completely proved probate will be granted to the extent to which they are proved.

When a cause in the Probate Division has been heard before a judge without a jury, the evidence being given vivâ voce, the parties may, if they please, apply for a re-hearing under Rule 60 of the Probate Court Orders of July, 1862, or they may, without doing so, appeal from the decision of the judge, on the facts as well as the law, to the Court of Appeal.

THE plaintiffs, the Hon. and Rev. Frank Sugden, the Hon. Charlotte Sugden, and John Reilly, propounded, as executors, the contents of a lost will dated on or about the 13th of January, 1870, of the Right Hon. Edward Burtenshaw Baron St. Leonards, late of Boyle Farm, in the county of Surrey, deceased, who died at Boyle Farm on the 29th of January, 1875, at the age of ninety-three. They also propounded eight codicils to the said will, such codicils being produced and filed in the registry.

The declaration, after alleging, 1st, the due execution of the will and codicils, went on to allege:—

2. That the said will never was revoked or destroyed by the testator, nor by any other person in his presence or by his

direction, with the intention of revoking the same, and that the same was, at the time of his death, a valid and subsisting will, but that the same cannot be found.

3. That the contents of the said will were, in substance or to the effect, as follows:—"This is the last will and testament of me, Edward Lord Saint Leonards. I appoint my son the Honourable and Reverend Frank Sugden, my daughter the Honourable Charlotte Sugden, and my son-in-law John Reilly, trustees of this my will (the said John Reilly being substituted as trustee for his brother Francis Reilly after the execution of the said will, such substitution being confirmed by the said second codicil). I devise to the use of the said Honourable and Reverend Frank Sugden, the Honourable Charlotte Sugden, and John Reilly, and their heirs, my estates of Childerley Hall, in the county of Cambridge, of Sutton Scotney House, in the county of Hants, of Peasemore, in the county of Berks, of Tilgate Forest Lodge, in the county of Sussex, and of Boyle Farm, and the aits in the river Thames. Together with my land and cottages at Thames Ditton, in the county of Surrey, to hold the same (but subject to the charges hereinafter made thereon) upon the following trusts: Upon trust for my grandson Edward Burtenshaw Sugden for his life, and after his death for his first and other sons successively in tail male, and subject thereto for my grandson Henry Frank Sugden for his life, and after his death for his first and other sons successively in tail male, and subject thereto for my grandson Walter Sugden for his life, and after his death for his first and other sons successively in tail male, and subject thereto In trust for my said son Frank for his life, and after his death for his eldest son Frank for his life, and after his death for his first and other sons successively in tail male, and subject thereto for my son Frank's second son Edward for his life, and after his death for his first and other sons successively in tail male, and subject thereto for my son Frank's third son Henry Richard for his life, and after his death for his first and other sons successively in tail male. And I hereby direct that the trustees of my said will shall, out of the rents and profits of the trust estates, keep up and pay the fire insurances on all the buildings situate on the said estates. And I further direct that no trees shall be cut down on the Tilgate Farm

1876

SUGDEN v. LORD ST. LEONARDS.

Lodge Estate, which has been let on a long lease, during the present tenancy to the annoyance or detriment of the tenant thereof. I give all my household furniture, books, plate, pictures, marble, bronzes, and china at Boyle Farm to my said trustees, to hold the same as heirlooms, to descend and be enjoyed with real estates hereinbefore devised so far as the rules of law and equity permit. I give unto my said grandson Edward Burtenshaw an immediate legacy of 750*l.* And also all my carriage horses and farm horses, carriages, carts, with the trappings, and clothing belonging to them, and all my stable and garden implements, and all my wine and other spirits, and also my dairy stock, and the hay, corn, and stock in or belonging to my stables, and my household linen and household stores absolutely, with the exceptions hereinafter stated. I devise to my daughter Charlotte for her life, my house and grounds at Thames Ditton, at present let to the Reverend F. Style, together with two cottages adjoining thereto, the one let to . . . . Potter, and the other to . . . . Bartlett. Also Saint Leonards Farm, together with the house on the said farm at present let to Mr. Lewis, and two small houses on the same farm, one being let to Mr. Crowther and the other to Mr. Wardrop. And I direct that the said Reverend F. Styles shall be at liberty to remain as tenant of the said house and premises at his present rent during the life of my said daughter, but in case he shall cease at any time to be tenant thereof during her life, then I direct that my said daughter shall have power to let the same at rack rent during her life, and upon the death of my said daughter I devise the said house and premises, farm, and cottages hereinbefore given to my said daughter for her life, to my said trustees, to hold the same upon the same trusts and subject to the same limitations as I have hereinbefore declared concerning my Childerley Hall and other estates hereinbefore devised. I give to my daughter Charlotte a legacy of 6000*l.*, which I direct to be paid out of the policy moneys of 10,000*l.* insured on my life. And I also direct that as she will be beginning housekeeping she shall have out of my farming stock two cows, to be selected by herself, out of my conservatory two dozen plants, also to be selected by herself, and two dozen bottles of my old sherry. And I further direct that my grandson Edward Burtenshaw do deliver to her two loads of hay and two loads of

straw. I also give to her the harp which was given to her by me some years ago, and I direct that she shall be at liberty to select and take out of her bedroom at Boyle Farm such ornaments and articles of furniture, many of which have been given to her by her mother and me, or purchased by herself, as she may think fit. And I also give her the sum of 750*l.* to enable her, if she so desires, to make an addition to one of the houses devised by me to her for life, but I direct that it shall be entirely in her discretion whether to add or not to add to either of the said houses.

"And I further direct that my executors pay the sum of 2000*l.* to the trustees of the settlement of my daughter Juliet, made on her marriage with Kenneth Dixon, payable by my bond to the said trustees. I direct my house and establishment at Boyle Farm to be kept up by my executors at the cost of my estate for one month after my death for the use of my daughter Charlotte. I direct my executors to pay to my daughter Charlotte 60*l.* per annum during the life of an aged person, to be named by her, to be applied by her for the benefit of that person. And I appoint my son Frank, my daughter Charlotte, and the said John Reilly, executors of this my will, and I give to the latter 200*l.* for his trouble.

"This is an addition to my will. I devise my estate of Kingsdown, in the county of Kent, to the use of the trustees of this my will, their heirs and assigns, upon the following trusts: namely, upon trust for my son Frank for his life, and after his death for his son Frank for his life, and subject thereto for his first and other sons successively in tail male, and subject thereto for my son Frank's second son Edward for his life, and after his death for his first and other sons successively in tail male, and subject thereto for my son Frank's third son Henry Richard for his life, and after his death for his first and other sons successively in tail male, and subject thereto upon the same trusts as are hereinbefore declared with respect to my Childerley Hall and other estates hereinbefore devised in trust. Provided, however, and I direct that if my personal estate shall be insufficient for the payment in full of the pecuniary legacies bequeathed by me, and to discharge my testamentary and other expenses, until they shall have been fully paid, my son Frank shall only receive 300*l.* a year out of the income of

1876

SUGDEN v. LORD ST. LEONARDS.

the Kingsdown estate, the rest of the income to be applied to make up the deficiency. I further charge my estate of Kingsdown with the annual payment due from my son-in-law the Reverend Robert Mann to Queen Anne's Bounty, for the building of the vicarage of Long Watton, in Leicestershire. I give to each of my three granddaughters, Georgina, Helen, and Caroline Jemmett, 150*l.*, and I also give to the trustees of my said will three life annuities of 50*l.* each upon trust as to every of the same for one of my said granddaughters, and I hereby charge the same on my Childerley Hall and other estates firstly hereinbefore devised. I give 200*l.* to my daughter Sophia Cleaveland, and 100*l.* to her daughter Sophia, to whom also I leave my small gold watch and chain. I give to my daughter Caroline Turner 200*l.*, to my daughter Augusta Reilly 300*l.*; to her three daughters, Emily, Winifred, and Kathleen, 150*l.* each; to my daughter Harriet Mann 200*l.*; to her daughter Florence 200*l.*; and to Juliet Pearson 100*l.*; and I direct that if any of the said legatees shall die in my lifetime, that in such case the said legacy shall lapse. I direct that my executors give all the domestic servants who shall be in my service at the time of my death one month's warning and one month's wages, in addition to the wages due to them. And I direct that the mourning of my servants and the expenses of my funeral shall be on the same scale as was observed on the death of my wife. I appoint my three daughters, Charlotte Sugden, Caroline Turner and Augusta Reilly, my residuary legatees. In the event of all the devises and limitations over hereinbefore contained respecting my real estate failing, then I devise Boyle Farm, with all the household furniture, books, plate, pictures, marbles, bronzes, and other effects to my grandson Edward Burtenshaw absolutely, and my estate of Kingsdown to my son Frank absolutely, and my estate of Peasemore to my daughter Charlotte absolutely."

The defendant, the Right Hon. Edward Burtenshaw Lord St. Leonards, the grandson and heir-at-law of the deceased, and his brothers and sisters, who were minors, and appeared by their mother as their guardian, pleaded

1. That the alleged will was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

2. That the said alleged will was duly revoked by the said deceased by destroying the same with the intention of revoking it.

3. That the contents of the said alleged will were not as set out in the declaration.

4. That the codicils enumerated in the declaration were not respectively duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

5. And for a further plea to the said last-mentioned portion of the said declaration, and to each of the said codicils respectively, the said defendants say that the said codicils respectively were intended by the said deceased to be dependent upon and operate in conjunction with the will in the declaration mentioned, and to have no force or effect apart therefrom, and together with such will to form and do form one complete testamentary instrument and disposition, and that the said deceased duly revoked the said codicils respectively by destroying the said will, with the intention of revoking the said complete testamentary instrument and disposition.

The same pleas were pleaded by the interveners Miss Cleaveland, a granddaughter of the deceased, the Hon. Harriet Mann, a daughter of the deceased, Arthur Sugden, the son of a deceased son of the deceased, appearing by his mother as his guardian, and the children of Mrs. Jemmett, a deceased daughter of the deceased.

During the progress of the suit Miss Cleaveland married a Mr. Henderson.

The replication of the plaintiffs joined issue on the 1st, 3rd, and 4th pleas.

As to the 2nd plea, they denied that the alleged will was duly revoked by the deceased by destroying the same with the intention of revoking it, as in the said plea alleged, and took issue thereon.

As to the 5th plea, they denied the averments contained in the plea to be true, and further demurred to it as bad in substance, the matter of law to be argued being that the plea did not aver that the codicils propounded had been revoked in any of the modes indicated by 1 Vict. c. 26, as the only modes by which testamentary papers can be revoked.

1876

SUGDEN v. LORD ST. LEONARDS.

The defendants and interveners joined issue on this replication and joined in the demurrer.

On the 22nd of June, 1875, upon the application of the plaintiffs, and by consent, the judge made an order that the cause should be heard by the Court itself, without a jury, and on the 17th of November, 1875, the cause came on for hearing before Sir J. Hannen (President) without a jury.

Hawkins, Q.C. (*Inderwick, Q.C.*, and *Dr. Tristram* with him), for the plaintiffs.

Dr. Deane, Q.C. (*Thesiger, Q.C.*, and *Bayford* with him), for the defendants.

Dr. Spinks, Q.C., Sir H. James, Q.C., G. Browne, and *Searle,* for interveners.

Several witnesses were examined to prove the due execution of the will and codicils upon which no question was raised. The principal witness as to the preparation and the execution of the will, and the only witness who was able to give evidence as to its contents, was the Hon. Charlotte Sugden, one of the plaintiffs. She was the only unmarried daughter of the deceased, and had lived with him for many years prior to and up to the time of his death. The substance of her evidence, and that of the other witnesses, is set out in the judgment of Sir J. Hannen. It is sufficient here to state that the will and all the codicils were holograph, that they were all kept in a small black box, something like a dispatch box, of which the deceased had the key; that the box was usually placed in the saloon used by the deceased as his sitting-room at Boyle Farm; that the will was last seen by Miss Sugden on the 20th of August, 1873, when the last codicil was executed, and it was then replaced in the box; that during an illness of the deceased from September, 1873, until December, 1873, and again from March, 1874, when the deceased was attacked with his last illness, until his death, the box was in the custody of Miss Charlotte Sugden, and that after his death, although the codicils and some other testamentary papers were found in the box, the will was not there. Every possible search had been made for it, but it could not be found. There was evidence that the box was usually kept locked, and that the key was on a bunch kept by the deceased, that there was a dupli-

cate key kept in an escritoire, and that there were five keys in the house by which the escritoire could be opened, one of these keys belonging to a wine cupboard in charge of the butler. Immediately after the will was found to be missing from the box, Miss Charlotte Sugden said that she recollected its contents, and then, at the suggestion of her solicitor, Mr. Trollope, she wrote out from memory, without reference to the codicils and other testamentary papers which were in the box, the following statement:—

"The will appointed three trustees, his son Frank, his daughter Charlotte, and Mr. Francis Reilly, but the name of his brother, Mr. John Reilly, was afterwards substituted in his place, and is what is referred to in one of the codicils. The different estates were then vested in them in trust for his grandson; these consisted of Childerley Hall; Sutton Scotney House; Peasemore; Tilgate Forest Lodge; and Boyle Farm, with land and cottages in Thames Ditton and the aits; these were entailed on his grandson Edward B. Sugden, and his heirs male, and in succession, in default of any such, to his brothers Henry and Walter, and their heirs male; failing them, to his son Frank Sugden, and his heirs male, and in succession to each of his sons, Frank, Edward, and Henry, and their heirs male. Then he entailed all the furniture, pictures, marble, bronzes, china, and plate. In the same manner he left his grandson Edward B. Sugden an immediate legacy of money, the amount of which was afterwards changed (as referred to in the codicil) and a smaller sum substituted, and he then placed his name against it. He directed that, as Tilgate Forest Lodge was let on a long lease, no trees should be cut to injure the property. He gave absolutely to his grandson Edward B. Sugden all his carriages, horses, farming, and dairy stock (with an exception afterwards stated), hay, wine and spirits, linen, and household stores. To his daughter Charlotte he left 6000*l.*, to be paid out of 10,000*l.* life insurance, and a life interest in a house and grounds in Thames Ditton, let to the Rev. F. Style, and in two cottages adjoining. Also in St. Leonards Farm, and a house on the farm let to Mr. Lewis, and in two small houses on that property let to Mr. Crowther and to Mr. Wardrop. All these, after her death, were to go to the peerage entailed as before. He also left her two cows, which she was to select, and two dozen plants out of the conserva-

1876

SUGDEN v. LORD ST. LEONARDS.

tory, which she was also to select, and two dozen bottles of the old sherry, and he directed his grandson to deliver to her two loads of hay and two of straw, as she would be beginning housekeeping, the harp he had given her some years ago, and she was to take all she wished from her own bedroom, many things in which had been given her by her mother and himself, or purchased by herself. He also left her 750*l.* to build, if she wished it, an addition to one of the houses left her for life, but this was to be left entirely to herself. This is the sum referred to as having been revoked when he gave her a cheque on Messrs. Hoare for 1500*l.* to build a house on Second Meadow. He directed that 2000*l.* should be paid to his daughter Juliet, according to her marriage settlement. Kingsdown, the property he last bought, he settled on his son Frank, and entailed it on him and his sons Frank, Edward, and Henry, and their heirs male, in default of such then to the peerage entailed on the heirs male the same as the other estates; he directed that out of the rents of Kingsdown 350*l.* should be paid to his son Frank until his other legacies should be paid, if the money was required, and he charged the estate with the annual payment of Queen Anne's bounty during the life of his son-in-law, the Rev. Robert Mann; there were directions about buying small pieces of land out of the rents, but these he afterwards struck out; legacies of sums varying from 150*l.* to 200*l.* were left as tokens of love to different members of his family, and were, as nearly as I can recollect, 150*l.* each to his three granddaughters, Georgina, Helen, and Caroline Jemmett; 200*l.* to his daughter Sophia Cleaveland, 200*l.* to her daughter Sophia, to whom he also left his small gold watch and chain; 200*l.* to his daughter Caroline Turner; 200*l.* to his daughter Augusta Reilly, and 150*l.* each to her daughters Emily and Winifred; 200*l.* to his daughter Harriet Mann, and 200*l.* to her daughter Florence; if any died in his lifetime, the legacy was to lapse. He left 60*l.* per annum to his daughter Charlotte for the benefit of an aged person to be selected by her. He named John Reilly, Frank Sugden, and Charlotte Sugden his executors, and he left his three daughters Charlotte, Caroline, and Augusta, residuary legatees. He directed Boyle Farm to be kept up for a month for the use of his daughter Charlotte. His servants were to have a month's warning, a month's wages; and the

mourning for his servants and funeral expenses were to be the same as on the death of his wife.

(Signed) "Charlotte Sugden."

After Miss Charlotte Sugden had written out the statement and shewn it to her solicitor, some questions were put to her, and in answer to them she wrote out the following additional statement:—

"This is the best of my belief. There were also legacies. In case of all heirs male failing, to his grandson E. B. Sugden he left Boyle Farm and its contents absolutely; Kingsdown to his son Frank absolutely; and Peasemore to his daughter Charlotte absolutely. I do not remember how the rest was left, though I know he left them to different members of his family. He directed his trustees to keep up the fire insurance on his estates, including his daughter Charlotte Sugden's house.

(Signed) "Charlotte Sugden."

No evidence was called by the defendants and interveners, and the questions argued were, first, whether there was sufficient evidence of the contents of the will; and, secondly, whether there was evidence to rebut the presumption of revocation arising from the disappearance of the will.

No question arose upon the codicils, but their contents were referred to as corroborating (according to the plaintiffs' argument), and as being to some extent inconsistent with (according to the defendants' and interveners' argument), the recollection of Miss Sugden as to the contents of the will. It is therefore necessary to set them out, and also to set out some of the other testamentary papers found in the box and referred to in the argument and in the judgment.

The codicils, omitting the attestations and the signatures of the attesting witnesses, were as follow:—

"This is a codicil to the will of me, Edward Lord St. Leonards. I have struck my pen through so much of my will as provides legacies for life of 50*l.* per annum to every of my three granddaughters, Georgina, Helen, and Catherine Jemmett, and the charge thereof on my principal estates devised to my grandson

1876

SUGDEN v. LORD ST. LEONARDS.

Edward Burtenshaw, and I hereby revoke the said gifts and charges, and in lieu thereof I give to the trustees in my will named three like life annuities of 50*l.* each, making 150*l.* per annum, upon trust as to every of the same for one of my said granddaughters during her life, and to cease and not go over on her death, and the said life annuities shall be a charge upon, not the estates directed by my will, but upon my Kingsdown estate, in the county of Kent, devised by my will, with rights of distress and entry to compel payment thereof, if and when in arrear, in like manner as by law landlords may distrain for rents in arrear. And I direct the life annuity of every one of my said three granddaughters to be paid to her as far as the law allows into her own hands, for her sole and separate use, free from marital control, and for which her receipts shall be discharges, but without any power of anticipation. As my object is to add somewhat to the portions of my said three granddaughters under the marriage settlement of their parents, and not to substitute my donations for such portions, I direct that if any one or more of them shall in my lifetime, or after my decease, assign over or part with, or agree to do so, the portions or portion under the settlement belonging to them, except upon marriage, the life annuity or life annuities of every or any such granddaughter shall never take effect, or shall thereupon cease and be no longer payable, as the case may be. The annual sum which I have allowed to my grandson Edward Burtenshaw will cease upon my death; a proportionate part is to be paid to him up to my death, and also within fourteen days after my death 70*l.* as a legacy. In all other respects I ratify my said will. In page 1 of this codicil I have put my initials to an interlineation, and also one in page 19 of my will, and which interlineations were so signed by me before I sign this codicil, or the witnesses attest it. In witness whereof I do to this my codicil, set my hand this 23rd day of March, 1870.

"St. Leonards."

"This is a second codicil to my will. The principal alteration in my will is the substitution of another person as my trustee, and as such legatee in the place of the trustee, and, as such, a legatee in my will. The parts through which I have run my pen I do hereby revoke. In all other respects I ratify my said will and

first codicil. My additional initials were signed by me before I signed this codicil, or the witnesses attested it. In witness whereof I sign this codicil this 4th day of July, 1871."

"St. Leonards."

These codicils were endorsed:—

"A codicil to my will,
"23rd March, 1870."

"A second codicil to my will,
"4th July, 1871.

"Re-signed by me, having first placed my initials opposite to an erasure upon revocation by me of certain figures in line 15. In witness whereof I sign my name.

"St. Leonards. St. Leonards."

"I made a third codicil to my will which I hereby revoke, and this is the third codicil to my will. By my will, I gave to my dear daughter Charlotte 750*l.* for the purpose of building, in addition to the legacy thereby bequeathed to her, and which legacy I hereby confirm, and I by the third codicil hereby revoked, gave her a life interest in my Second Meadow (next to Boat House Close), with remainders over, and 1500*l.* to build a house on it. Now I hereby revoke the said legacies of 750*l.* and 1500*l.*, and the life interest in my Second Meadow, and the remainders over, and in lieu thereof I give to my said daughter Charlotte, her heirs and assigns, my said meadow. (In margin—St. L. 750*l.* and 1500*l.* revoked, because paid by me.)

"In witness thereof, I sign this my third codicil, this 16th of September, 1871.

"St. Leonards."

The codicil was endorsed:—

"16th of September, 1871.

"A third codicil to my will."

"20th of September, 1871.

"This is a fourth codicil to my will. I revoke the devises in my will or former codicils contained, so far as they are devises of my meadow, called Boat House Close. I have by my last codicil

1876

SUGDEN v. LORD ST. LEONARDS.

given to my dear daughter Charlotte, in fee simple, my 'second meadow,' which adjoins my said first-mentioned meadow, called Boat House Close, and I devise the said Boat House Close to my said daughter Charlotte, her heirs and assigns for ever, so that she will be entitled in fee simple to both the said meadows, and these are in addition to the legacies and provisions made for her by my will and codicils and not since revoked. In witness whereof, I sign this my fourth codicil, this 20th of September, 1871.

"St. Leonards."

"24th of November, 1871.

"This is a fifth codicil to my will. In addition to all my previous gifts to my daughter Charlotte, I hereby give to her, in fee simple, my meadow called Shoulder of Mutton Close, so that she will be entitled to all my meadows in the Summer Road in fee simple. In witness whereof, I sign this my fifth codicil, this 24th of November, 1871.

"St. Leonards."

Indorsed—

"20th of September, 1871.
"A fourth codicil to my will."

"24th of November, 1871.
"Fifth codicil."

The sixth codicil was commenced on the back of the third codicil, following the indorsement, "A third codicil to my will," and was as follows:—

"25th March, 1872.

"This is the sixth codicil to my will. I have paid to my daughter Charlotte the 1500*l.* legacy given to her by my third codicil; therefore I revoke the legacy of that sum to her by the within-written codicil. She intends, with my permission, to build herself a house on Second Meadow, which meadow, upon my death, will belong to her. In the meantime, I authorize her to erect such building, and to enjoy and occupy it as she may desire.

"St. Leonards.

"I sign this, my sixth codicil, this 27th day of March, 1872."

The month and year were written in the margin, and the codicil was continued on a separate sheet of paper as follows:—

"A continuation of my sixth codicil.

"I give to my son Frank, in addition to the other devises to him, my Sutton Scotney Farm and the manor and village property there to my son Frank Sugden for his life, and I revoke so much of any previous devise by me as would interfere with that gift, but no further; and after his death, I declare that it shall return to the several uses declared of it by previous devises by me. And I charge the said Sutton Scotney estate with the payment of 100*l.* a year to my daughter Harriet Mann during her life, for her inalienable separate use. And I hereby revoke my previous devises of my Tilgate estate, in the county of Sussex, and I devise it to my daughter-in-law Marianne Sugden, widow of my late son the Hon. Henry Sugden, for her life, and after her decease, to her second son Henry Frank, his heirs and assigns, subject to the conditions in my said will contained for the benefit of the present tenant. In witness whereof, I sign this my sixth codicil.

"St. Leonards."

"This is a seventh codicil to my will.

"I give to my son, the Hon. and Rev. Frank Sugden, for his life, Boyle Farmhouse, and the gardens and grounds and buildings belonging to it, and the two meadows opposite (the fifteen acres and the two acres), and the aits on the Thames, and he is to have the enjoyment during his life of the pictures, bronzes, china, plate, marbles, and all articles of vertu and furniture in and about Boyle Farm. And after his death the same shall revert to the uses named in my will, and I revoke any gift in my will or any codicil contained, so far as, and only so far as, it would interfere with these directions. I revoke the gifts in my will contained to my grandson Edward Burtenshaw of my carriage horses, and farm horses, and all my carriages and carts, with the trappings and clothing belonging to the same, and all the stabling and garden implements, and all the wine and other spirits of which I shall die possessed, and also my dairy stock, and the hay, corn, and stock in, or belonging to, my stables, and I give the same to my said son Frank Sugden, save and except the sherry given to my said daughter Charlotte, and which is to be delivered

1876

SUGDEN v. LORD ST. LEONARDS.

to her. This is a codicil to my last will. In witness whereof, I have hereunto set my hand this 1st of May, 1872.

"St. Leonards."

Indorsed—

"Sixth and seventh codicils to my will.

"St. Leonards.

"1st of May, 1872."

"This is a further codicil to my will.

"Whereas my daughter Charlotte has, with my leave, built herself a house for her occupation when this house passes away. And whereas under my will and codicils she will become possessed of the three meadows, Boat House Close, Second Meadow, and Shoulder of Mutton Field, and her house is built on Second Meadow, and it will be her residence when I depart this life. Now I declare and direct that Second Meadow and her house upon it shall be considered altogether as Second Meadow, and as such shall pass to and belong to her in fee simple, so that her present interest in Second Meadow and the house upon it may be added to my present interest in that meadow and the house upon it, and go along with it to her, as I have said, in fee simple. In witness whereof I sign this my eighth codicil this 20th of August, 1873.

"St. Leonards."

The following papers, marked J. and K., also holograph, were found with the codicils in the box:—

"J."

Legs.		Kingswood.
C. . . .	750	F. £300 a yr.
	6000	
S. Cd. . . .	200	Rt. M. Q. A. B.
Her dau. . .	100	Legs.
Aug. . . .	300	~~other~~ Estates
Girls . . .	450	£150 p. ann. 3 Girls.
Ht. . . .	240	
Florence . .	200	
Jt. P. . . .	100	
	200	
	8540	

Exps. . .	2000 Jt.		
Debts, &c.	2,500 Exps.	Persl. est. .	21,240
	1,000 Debts, &c.		14,040
	5,500	Surplus .	7,200
	8,540	Edwd. . .	720
	£14,040		£6,480

	March, 1870.	1871.
Equitable	10,000	
Do., say	200	
Railway	3,000	
Do.	800	
Turkish Bonds . . .	3,420	£4,000
India 5 p. Ct. . . .	1,120	10,000
Balce. at Bankers . . .	1,100	1,200
Arrears of rent, say . .	2,000	
	20,640	600
Arrears of pension, say . .	600	9,500
	21,240	15,100

"K."

Oct. 1867.

Present rental, nearly net.

	1,580 Childerley.
	1,000 Sutton Scotney.
	250 Tilgate.
£20 added Charlotte for life	120 my farm.
	82 Style's house and land.
	18 cottages, &c., do.
	Crowther cott. and land.
	25 Wardrop Cottage.
£305	50 Giggs Hill Cotts.
	14 Cottages, late Sullivan's.
	35 Church Cottage.

1876

SUGDEN
v.
LORD
ST. LEONARDS.

17	4 Cottages in Street.
30	Say Timber at Tilgate.
3,281	
1,260	Peasemore.
	~~88 Tithe Rent-Charge.~~
4,629	
40	Cotts. and Manor of Sutton Scotney, an average.
4,669	
4,669	
88	settled on Arthur's family.
4,581	

Oct. 1867.

Land in hand.	Annual value.
£	
36	3 meadows in lane.
60	2 Fields in Road.
96	
×600	Boyle Farm Paddock and Aits.
£696	p. ann. value.
4,669	Rental.
5,365	

×£600	
£400	
1,000	p. ann. for Boyle Farm furnished Cotts. and Paddock and Aits.
£5,365	Rental and value.
×400	p. ann. for Pictures, Plate, and furne., &c., in Boyle Farm.
£5,765	

A copy, not holograph, but in Miss Sugden's handwriting, of a second codicil, which was destroyed by the deceased after its execution in consequence of the matrimonial engagement to which it referred being broken off, was not found in the box, but was produced in the course of the proceedings. It was as follows:—

"This is a second codicil to my will, this 18th of April, 1870, and the date will shew to those interested why I changed the disposition in my will. I revoke the legacy of 700*l.* by my codicil given to my grandson Edward Burtenshaw; and I revoke all the immediate and reversionary life, in fee, and other interests in my several estates and in my heirlooms in my will devised to my said grandson, and all such life, in fee, and other interests are to be subject to the following proviso, viz.: Provided always that if my said grandson shall intermarry at any time with . . ., then and immediately thereupon such life, in fee, and other interests so given or provided for my said grandson shall cease and become void, and I hereby revoke them, and thereupon all the properties in and over which any interest is given to him by my will shall vest in the trustees named in my will, their heirs, executors, and administrators, upon trust to pay to my said grandson during his life from and after such intermarriage a clear yearly income of 800*l.* by two equal payments in every year, and upon such other trusts, but none of them in favour of my said grandson, as I shall declare by another codicil to my will. And I direct the payments by my will and first codicil directed to be paid out of Kingsdown not to be so paid, but to be a charge upon and to be paid out of the estates of which my grandson is by my will made tenant for life, and those payments are the one yearly paid by me for my son-in-law Robert Mann, and the three life annuities of 50*l.* apiece which I have given to three of my granddaughters. In witness whereof I do to this my second codicil set my hand this 18th day of April, 1870.

"St. Leonards.

"The two interlineations and the erasure were made before I signed the codicil."

The eldest son of the deceased, Henry, died in 1866, leaving his eldest son, the defendant, the present Lord St. Leonards, and

1876

SUGDEN v. LORD ST. LEONARDS.

another son surviving him. The second son, Frank, one of the plaintiffs, had two sons. The third son, Arthur, predeceased the testator, leaving a son, the intervener Arthur, an infant, surviving him. There were several daughters, all of whom were married, with the exception of Miss Charlotte Sugden, one of the plaintiffs, and some of whom predeceased the testator and left issue surviving them.

At the close of the evidence,

Hawkins, Q.C., for the plaintiffs, addressed the Court on the two questions raised: First. Whether there was sufficient evidence of the contents of the missing will to enable the Court to pronounce for the contents as propounded. Secondly. Whether there was evidence to rebut the presumption of revocation arising from the disappearance of the will.

1. The evidence of Miss Sugden is corroborated by the declarations of the deceased made at various times between the date of the will and his death to various persons, and also by the testamentary documents in the deceased's handwriting. Miss Sugden's integrity is not disputed, and the only question is as to the accuracy of her recollection. She had remarkable opportunities of making herself acquainted with the contents of the will, for it was carefully read over to her by the deceased before its execution, and after its execution she herself read it over, and she had her attention recalled to the contents whenever the deceased, by a codicil, made any alteration in its dispositions. There is every probability that the contents should become, as she says they were, firmly impressed on her memory.

2. It cannot be doubted that, on the 23rd of August, 1873, the date of the last codicil, the will and the eight codicils were locked in the box by Lord St. Leonards, and he had given no indication of a desire to revoke any one devise or bequest contained in either of those documents. The box was locked, not by a patent key, but by an ordinary key, and there was a duplicate key kept in the escritoire. The escritoire could be opened by no less than five keys, one of which was under the charge of the butler for the time being. Many persons, therefore, besides Lord St. Leonards might, if they were so minded, have obtained access to the box in

which the will and codicils were kept, and it is doubtful whether a will so placed can be said to have been in the custody of the deceased, in such a sense as to give rise to the presumption of revocation because it was missing after his death. But assuming that presumption to have arisen, it is rebutted by all the probabilities of the case, and by repeated declarations made by the deceased down almost to the moment of his death, shewing not only that he did not wish to die intestate, but also that he believed that he was not intestate and that the will was in existence. [The cases of *Brown* v. *Brown* (1) and *Welsh* v. *Phillips* (2) were cited.]

Dr. Deane, Q.C., for Lord St. Leonards. 1. Admitting to the fullest extent the integrity of Miss Sugden, and her desire to tell the truth as to the contents of the will to the best of her recollection, she must, nevertheless, be subject to failure of memory, to confusion of ideas, and to mistake. Her statements are only to the best of her belief, and some of the statements made by her in the first instance she has since had to qualify, and, in one instance at least, the legacy to Lord St. Leonards, she has admitted that she was mistaken. It is evident, from the number of testamentary papers, that the mind of the deceased was constantly fluctuating as to the disposition of his property, and looking at the number of changes in the intentions of the deceased, his frequent conversations with Miss Sugden as to those changes, and the different testamentary documents brought to her knowledge at different times, is it possible for the Court to accept her recollection of the contents of one of these documents as so complete and accurate as to entitle it to probate? It is proved that the deceased was, above all things, anxious that a suitable provision should be made for the peerage; but if the will as propounded should be established, no provision whatever is made for the peerage in the not improbable event of its devolving on Arthur Sugden.

2. The box in which the will had been contained was undoubtedly in the deceased's custody down to the time of his death. No suggestion has been made as to any person who was likely to have been guilty of the crime of abstracting the will, and it is difficult to conceive what motive or object any person could have

(1) 8 E. & B. 876; 27 L. J. (Q.B.) 173. (2) 1 Moo. P. C. 299.

4 Jur. N.S. 163.

1876

SUGDEN v. LORD ST. LEONARDS.

had for committing such a crime. If any one did abstract the will from motives of malice or curiosity, why were the codicils left? If mere curiosity was the motive, the will might have been replaced after that curiosity had been gratified. That the deceased had ample opportunity of taking the will from the box and destroying it cannot be doubted. It is highly probable that when he reflected on the inartistic drawing of the will, and the alterations made in it by the codicils, and especially when he remembered that no provision had been made for the peerage in the event of its devolving upon Arthur, he should have made up his mind to revoke the will, leaving the codicils in force. Perhaps he intended to make a fresh will, and died before that intention was carried into effect. [The following cases were cited by Dr. Deane: *Patten* v. *Poulten* (1), *Cutto* v. *Gilbert.* (2)]

Sir H. James, Q.C., for Mr. and Mrs. Henderson. The question is, whether the parol evidence which has been produced of the contents of the will has reached that standard of proof which has hitherto been considered necessary before the contents of a written document could be established by parol. In *Wharram* v. *Wharram* (3) Lord Penzance pointed out how necessary it was to require the strictest proof of the contents of a will as distinguished from other documents, especially since the passing of the Wills Acts. In *Patten* v. *Poulten* (1) the contents of a will were proved by oral evidence, but it was a short and a very simple will, and a draft was produced. In the present case we are dealing with a large and extremely complicated will, filling at least nineteen pages, and drawn by a testator of exceptionally acute mind, and thoroughly familiar with legal terms, and their exact legal meaning. It is hardly in the power of human memory to retain a complete and accurate recollection of such a will. The declarations of the testator, although admissible to shew adherence to the will, and to rebut the presumption of revocation, are not admissible to prove the contents of the will: *Quick* v. *Quick* (4); *Doe* d. *Shalcross* v. *Palmer.* (5)

(1) 1 Sw. & Tr. 55; 27 L. J. (P. & M.) 41. 4 Jur NS. 341.
(2) 9 Moo. P. C. 131.
(3) 3 Sw. & Tr. 301; 33 L. J. (P. & M.) 146. 10 Jur NS. 682.
(4) 3 Sw. & Tr. 442; 33 L. J. (P. M. & A.) 75. 10 Jur NS. 499
(5) 16 Q.B. 747; 20 L.J. (Q.B.) 367.

Thesiger, Q.C., for the other defendants, and for Mrs. Mann. The oral evidence by which the contents of a will may be proved should be more cogent and conclusive than is required for the proof of the contents of an ordinary contract, or any other written document, for this reason: in cases of contract, or other documents of a similar character, there must be two parties having conflicting interests, who are aware of the contents, and may give evidence of them, whereas from the very nature of wills it is impossible to contradict a person coming forward and professing to have read a will of which the contents were only known to himself and to the testator. [He referred to *Vallance* v. *Vallance* (1), *Trevelyan* v. *Trevelyan* (2), *Burls* v. *Burls* (3), *Patten* v. *Poulton* (4), *Finch* v. *Finch* (5), *Davis* v. *Davis* (6), *In the Goods of Gardner* (7), *Foster* v. *Foster* (8), *Martin* v. *Laking* (9), and *Knight* v. *Cooke.* (10)] Considering the fallibility of human memory, the intricacy of the will, the admitted imperfection of Miss Sugden's memory as to some parts of the will, can the Court come to the conclusion that it is in possession of the complete mind of the testator as to the disposition of the bulk of his property, and especially of his residuary personal estate? As to the admissibility of declarations of the testator for the purpose of rebutting the presumption of revocation he referred to *Keen* v. *Keen.* (11)

Nov. 25. SIR J. HANNEN (President). I have on this occasion to discharge the functions of a jury, and to give my verdict upon certain questions of fact, and my decree in the cause will be pronounced upon the basis of the findings at which I may arrive upon those questions. They have now been reduced to two, namely, first, what were the contents of the will, which it is admitted was duly executed and attested upon the 13th of January, 1870; and, secondly, was that will revoked, was it destroyed by the testator animo revocandi?

Now it is necessary that I should deal with these questions in

(1) 1 Hagg. Ecc. 693.
(2) 1 Phillim. 149.
(3) Law Rep. 1 P. & M. 472.
(4) 1 Sw. & Tr. 55; 27 L. J. (P. & M.) 41.
(5) Law Rep. 1 P. & M. 371.
(6) 2 Add. 223.
(7) 1 Sw. & Tr. 109.
(8) 1 Add. 462.
(9) 1 Hagg. Ecc. 244.
(10) 1 Lee, 413.
(11) Law Rep. 3 P. & M. 105.

(4) 1 C 4 Jur N.S. 341

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

the order in which I have stated them, because it is obvious that the question whether or no the testator revoked this instrument must depend to a considerable degree upon what conclusion I may arrive at as to the contents of the instrument itself. It is obvious that where a will, shewn to have been in the custody of a testator, is missing at the time of his death, the question whether it is probable that he destroyed it must depend largely upon what was contained in the instrument. Was it one arrived at after mature deliberation; did it deal with the interests of the whole of his family, carefully arranging the dispositions which he would make in favour of the several members of it, or was it the hasty expression of a passing dissatisfaction with some one or more of them? These are questions naturally having the strongest possible bearing upon the ultimate question which I may have to determine, namely, whether or not the testator himself destroyed this instrument. It is undoubtedly a great misfortune that, in order to arrive at a conclusion as to what the contents of the will really were, I have to rely upon secondary evidence; but I have already had occasion to remark that there is not, in my judgment, any difference in the principles of law applicable to the case of a lost will and to the case of any other lost document. That was decided in the case of *Brown* v. *Brown* (1), which has been referred to in the course of the arguments; and although there are some expressions in the case of *Wharram* v. *Wharram* (2) made by my predecessor, Lord Penzance, which are not altogether in harmony with the decision in *Brown* v. *Brown* (1), yet, as has been observed by that very learned judge and author, Sir Edward Vaughan Williams, in his work on Executors, Lord Penzance does not himself appear to have adhered substantially to the views which he expressed in *Wharram* v. *Wharram.* (2) I not only accept *Brown* v. *Brown* (1) as an authority upon the point, but I must say it is exactly in conformity with my own views. I have, therefore, to enter upon an examination of the question, what was contained in this will? It is unfortunate that the secondary evidence should to so large an extent be entirely of a parol character. It would have greatly strengthened the certainty with which I should deal with that

(1) 8 E. & B. 876; 27 L. J. (Q.B.) 173. 4 Jur N.S. 163
(2) 3 Sw. & Tr. 301; 33 L. J. (P. M. & A.) 75. 10 Jur N.S. 494

secondary evidence if it had consisted of the draft of the instrument that is missing; but that, as was observed by Lord Campbell in *Brown* v. *Brown* (1), only goes to the value of the evidence. It imposes upon me, however, the duty of exercising the utmost possible caution in dealing with evidence of this character. But if, notwithstanding the disadvantage I labour under, I arrive at a clear conclusion as to any of the contents of this will, it is my duty to find as a fact that such contents were a portion of the missing document.

I have felt with full force the value of the observations which have been addressed to me in the very able speeches which I have heard from those representing the several defendants in this case. Undoubtedly there is great danger in accepting evidence derived from the recollection of any person as to the contents of an instrument of this kind; that danger is greatly enhanced when such evidence is derived from a person deeply interested in establishing the instrument in the form in which that person alleges it existed. But, on the other hand, there would be very great danger if a Court were to lay down an arbitrary rule that in the event of a document, however important in its character, being missing, whether as the result of fraud or accident, it should be impossible to establish its contents by parol testimony. That might lead to the defeating of justice in many, if not in as many, instances as might arise from the Court acting upon such testimony. While I feel the difficulty and the danger that has been pointed out, yet it is right that I should observe what there is to be said on the other side with reference to Miss Sugden's testimony in this case. Undoubtedly, if the evidence of the contents of a long and complicated will were given by a professional man who had himself drawn the instrument or upon one or repeated occasions had had the opportunity of reading it, that would, under ordinary circumstances, be more satisfactory than the evidence of a non-professional person, above all the evidence of a lady. But Miss Sugden's position is exceptional; of her integrity there can be no doubt; that has been stated with even greater force by those who represent the defendants than by the learned counsel who represents Miss Sugden herself. She was the daily companion for many

(1) 8 E. & B. 876; 27 L. J. (Q.B.) 173. 4 Jur NS 163.

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

years of one of the greatest lawyers that ever lived; who was devoted to his profession; who to the latest years of his life delighted in carrying on his studies in that profession, and who took a pleasure in making plain to non-professional and otherwise uninstructed minds subjects of a somewhat complicated character in which he himself took an interest. Miss Sugden was his assistant and amanuensis in the preparation of the later editions of his works, and she appears to have been always with him upon the many occasions on which he dealt with his testamentary papers and dispositions. She had, therefore, so to speak, a special training, which put her in a position of much greater advantage than a lady under ordinary circumstances might be expected to occupy. In addition to that, she had ample opportunities of becoming acquainted with the contents of this instrument in particular.

The integrity of Miss Sugden, I must remind those who hear me, is not in question; and the value of that admission must not be qualified away by saying that though her integrity is undoubted her recollection may be warped by interest where her statements are specific as to facts, and as to which there is no room for doubt if she be the witness of truth. No bias derived from interest can mislead her as to the number of times when she read, or heard read, the contents of this will, and she says specifically that Lord St. Leonards himself read the will to her on one occasion, that she read it herself at his request on three other occasions, and that on several occasions when he was dealing with his testamentary papers she had the will before her or in her hands, referring to it from time to time in the course of the assistance which she was giving to her father. She had, therefore, ample means of becoming acquainted with its contents. I have now to proceed to examine whether or not, having those opportunities, she has given a correct statement in all, or in part, as to those contents. It is important to bear in mind the manner in which her statement upon this subject was brought into existence. When it was found that the will was missing, she, at the suggestion of her solicitor, Mr. Trollope, wrote down from memory the contents of the will. She states that she did so, taking precautions against the possibility of anything but her own recollection being infused into her statement. The several papers which were found in the

will box were at that time still in the box locked, and, I believe, sealed, in the presence of the present Lord St. Leonards, and they were only taken from that box after Miss Sugden's written statement had been placed in the hands of Mr. Trollope. She says also that she abstained from consulting any other person, in order that what she wrote might be the result of her own unassisted recollection. Accordingly she wrote down on paper the several particulars with which I shall have to deal. That paper has been properly admitted in evidence, and I shall have to compare it by and by with the more detailed and technical statement which has been embodied in the declaration. I may say in passing that a slight injustice has been done to Miss Sugden by referring to the declaration in the cause, rather than to her original statement, because it has been said, and naturally said, "Is it likely that a lady would recollect all this technical language appearing in the declaration?" That observation appears a just one, but its application vanishes when one looks at the original statement furnished by Miss Sugden, because that is not drawn up with all the technical formality which is now seen in the declaration, but it is written in the manner in which one would expect it to be written by a lady jotting down, as they came across her mind, the various provisions of the missing instrument. In considering what value I shall attach to Miss Sugden's statement of what was contained in her father's will, I have, as I have already stated, borne carefully in mind the fact that she is an interested party; that, above all other circumstances in the case, makes it my duty to see to what extent her statements are corroborated by independent testimony. Let me observe, however, with regard to this corroborative evidence, it is not necessary that I should find corroboration in every particular, and to the full extent of what Miss Sugden has said, before I give credit to her statements. Because that would be, in other words, to say that I ought not to use any evidence standing in need of corroboration unless there were proof enabling me to dispense altogether with the evidence to be corroborated. It is sufficient if I find that independent support is given to Miss Sugden's statements in so many instances that it raises in my mind the conviction that she is to be depended upon even in those matters in which I do not find corroboration elsewhere. But it is my duty, and I have

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

endeavoured to the utmost of my ability to discharge it, to seek step by step for the corroborative evidence in support of Miss Sugden's statement, in order that I might find what residuum there is for which I have to rely solely and exclusively upon what she says. Now, it has been rightly observed by more than one of those whom I have had the advantage of hearing, that the first source of corroboration to which one would naturally resort would be the instruments of a testamentary character in the handwriting of Lord St. Leonards himself. Taking them in order, and dealing with point after point in which they corroborate Miss Sugden's statement, I find that in the first codicil there is a statement to this effect: "I have struck my pen through so much of my will as provides legacies for life of 50*l.* per annum to every of my three granddaughters Georgiana, Ellen, and Catherine Jemmett, and the charge thereof on my principal estates devised to my grandson Edward Burtenshaw." That, I say, is evidence in confirmation of Miss Sugden's statement, that the will contained the demise of some estates which the testator there himself calls his "principal estates" to the defendant, the present Lord St. Leonards. It further proves that by that will annuities of 50*l.* to each of his granddaughters, the Miss Jemmetts, were charged on those estates; and I find this passage in the codicil: "And the said life annuities shall be a charge upon, not the estates directed by my will, but upon my Kingsdown estate, in the county of Kent, devised by my will." That proves, therefore, that he had devised the Kingsdown estate to somebody or other, and presumably to some one other than the defendant, since he transfers the charge of those annuities to that estate. Of course, however, this is but a slight presumption, because we know there are many reasons which might influence a person to transfer a particular charge from one estate to another, even though both were to be enjoyed by the same person. Fortunately, the question as to whom he had devised the Kingsdown estate does not rest upon so slender a presumption as that. Now, turning to the second codicil, that is, the one which was afterwards destroyed, and of which we have a copy in the handwriting of Miss Sugden, which has been dealt with upon one side and the other as correctly representing the contents of that instrument, I find this

passage: "I revoke the legacy of 700*l.* by my codicil given to my grandson Edward Burtenshaw, and I revoke all the immediate and reversionary life, in fee, and other interests in my several estates and in my heirlooms in my will devised to my said grandson." That, therefore, proves that he had devised and given the various interests there described, particularly the interests in heirlooms to the defendant; and further it says: "And I direct the payments by my will and first codicil directed to be paid out of Kingsdown not to be so paid, but to be a charge upon and paid out of the estates of which my grandson is by my will made tenant for life." So that I get a step farther in the process of proving what were the contents of the will itself, because he plainly says that Kingsdown has been charged with certain things, and then he goes on to say: "And these payments are the one yearly paid by me for my son-in-law Robert Mann and the three life annuities of 50*l.* a piece which I have given to three of my granddaughters." That legacy further shews that the defendant was only to be tenant for life of the estates which had been devised to him.

The second codicil, as it now must be numbered, shews that Miss Sugden's statement as to the contents of the will is correct in another particular, namely, that he had given a legacy, though the amount does not appear, to one of the trustees named in the will. She says that was a legacy of 200*l.* transferred from the one Mr. Reilly to the other upon the change in the trustees being made. This confirms her to that extent, and to that extent only, that there was a legacy to one of the trustees. While I am upon this codicil let me touch upon an argument which was pressed with great force by Dr. Deane, as to the effect of the words which are contained in it, namely, "The parts through which I have run my pen I do hereby revoke. In all other respects I ratify my said will and first codicil." Miss Sugden, in her original statement drawn up in the manner I have observed upon, says there were directions about buying small pieces of land out of rents, but these were afterwards struck out. Miss Sugden repeated that statement in the witness-box, but I do not think it was quite understood at the moment. Dr. Deane argues, "How can it be ascertained what were the parts which he had struck out with his pen? It may be that some most important devise or provision

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

may have been struck out by his pen as recorded here;" but it is to be observed that Lord St. Leonards himself has said in this codicil that the "principal alteration" in his will is "the substitution of another person as my trustee, and as such legatee in the place of the trustee, and as such a legatee in my will." And then he goes on to say, "The part through which I have run my pen I do hereby revoke." Is it conceivable that Lord St. Leonards should have spoken of the change of one trustee for another as the principal alteration in this will if he had, in fact, struck through with his pen any of the all-important provisions which are really and truly in question in this cause, or is it not rather consistent with what Miss Sugden said at the time, that it related only to these small parts of land which were to be bought out of rents? I come to the conclusion that it is more probable that Miss Sugden is right, and I adopt accordingly the view that he did not with his pen strike through the other provisions, to which I shall have to call more particular attention presently.

The third codicil contains this passage: "By my will I gave to my dear daughter Charlotte 750*l.* for the purpose of building." That supports the statement of Miss Sugden, that the will contained the passage: "I also give her the sum of 750*l.* to enable her, if she so desire, to make an addition to one of the houses devised by me to her." Then the third codicil goes on: "In addition to the legacy thereby bequeathed to her, and which legacy I hereby confirm." It, therefore, proves that, in addition to the 750*l.*, there was some other legacy contained in the will for her benefit, though it leaves the amount undetermined, and for that we shall have to rely upon other evidence.

The fourth codicil shews, though it is not of so much importance, that the Boathouse Close had not been devised to Charlotte in fee before. The fifth codicil I may pass over. Perhaps I ought to call attention to the fact that the fourth codicil says: "These are in addition to the legacies and provisions made for her by my will and codicils, or any of them, and not since revoked;" shewing that there were several things in her favour, but that does not add much force, I think, to the passages which I have already pointed out. The sixth codicil is important, and contains this passage: "I give to my son Frank, in addition to the other de-

vises to him, my Sutton Scotney Farm, and the manor and village property there to my son Frank Sugden for his life." That proves that there had been some property devised to Frank because he says it is to be in addition. Then he says further: "And I hereby revoke my previous devises of my Tilgate Estate in the county of Sussex, and I devise it to my daughter-in-law Maryanne Sugden." That proves that he had devised the Tilgate Estate, and though it does not prove, it lends support to the theory that it was, as Miss Sugden said it was, included in the enumeration of principal estates which were devised to the present Lord St. Leonards; but further, it proves, by what follows, another paragraph in Miss Sugden's statement, because it says: "This devise of the Tilgate Estate is to be subject to the conditions in my said will contained for the benefit of the present tenant." Miss Sugden has stated that the will contained this statement: "And I further direct that no trees shall be cut down on the Tilgate Farm Lodge Estate, which has been let on a long lease during the present tenancy, to the annoyance or detriment of the present tenant thereof."

The seventh codicil contains this statement: "I give to my son the Honourable Frank Sugden, for his life, Boyle Farm house and the gardens and grounds and buildings belonging to it, and the two meadows opposite (the fifteen acres and the two acres), and the aits on the Thames; and he is to have the enjoyment, during his life, of the pictures, bronzes, china, plate, marbles, and all articles of vertu and furniture in and about Boyle Farm. And after his death the same shall revert to the uses named in my will, and I revoke any gift in my will, or any codicil contained, so far, and only so far, as it would interfere with these directions. I revoke the gifts in my will contained to my grandson Edward Burtenshaw of my carriage horses and farm horses, and all my carriages and carts, with the trappings and clothings belonging to the same, and all the stabling and garden implements, and all the wine and other spirits of which I shall die possessed, and also my dairy stock and the hay, corn, and stock in or belonging to my stables; and I give the same to my said son Frank Sugden, save and except the sherry given to my daughter Charlotte, and which is to be delivered to her." It proves, therefore, since he revokes that bequest, that it

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

was contained in the will as alleged by Miss Sugden, who says the testator said: "I give unto my grandson Edward Burtenshaw all my carriage horses," and so on, in similar terms. But, says Dr. Deane, that shews uncertainty of memory, either on the part of the testator or of Miss Sugden, since he gives absolutely, by this codicil, the dairy stock, amongst other things, whereas Miss Sugden says that she was to have two cows out of the dairy stock. But it is to be observed that this is a substitution of a legacy to Mr. Frank Sugden in place of a legacy to the present Lord St. Leonards; and the testator might naturally think, and I for my part should say he was right in thinking, that that bequest to Mr. Frank Sugden would be subject to the like provision to which the bequest to the present Lord St. Leonards was subject, and which is contained in one of the paragraphs of Miss Sugden's statement, to this effect: "And I also direct that, as she will be beginning housekeeping, she shall have out of my farming stock two cows, to be selected by herself." I should further observe that this seventh codicil confirms Miss Sugden's statement that Lord St. Leonards had left her two dozen of sherry, because he says: "I give the same to my said son Frank Sugden, save and except the sherry given to my said daughter Charlotte, and which is to be delivered to her."

That brings me to the end of the information to be derived from the codicils. I now turn to the papers which appear to me to be next in value to the codicils themselves; I mean those papers, all of them in the handwriting of Lord St. Leonards himself, which were found in the will box, evidently placed there by him to be seen and dealt with in connection with his testamentary papers, and which bear internal evidence of having been drawn up, as Miss Sugden says they were, while he was in the act of preparing his will. She has described the mode in which those papers were used, and I think it clear that they do represent what Lord St. Leonards intended to do at the time when he was drawing the will in question. No doubt, as Dr. Deane has said, they do not in themselves prove that what is there jotted down was embodied in the will; but, having regard to the manner in which they were deposited with the other papers, they lend corroboration, and, as it seems to me, strong corroboration, to Miss Sugden's

statement as to the several legacies, particulars of which, in fragments, appear on those papers. In paper "J." the late Lord Leonards has enumerated on the one side the various legacies which he evidently contemplated introducing into his will; and the first is "C. 750*l.*," and no one has doubted that that means Charlotte, 750*l.* That, therefore, as it seems to me, is a corroboration of Miss Sugden's statement, that the will did contain this bequest: "I also give the sum of 750*l.*" Under the same initial of "C." are the figures 6000*l.* That, I take it, is a corroboration of Miss Sugden's statement that the will contained this bequest: "I give to my daughter Charlotte a legacy of 6000*l.*, which I direct to be paid out of the policy moneys of 10,000*l.* insured on my life." The next is "S. Cd. 200." That confirms this paragraph in Miss Sugden's statement: "I give 200*l.* to my daughter Sophia Cleaveland, and 100*l.* to her daughter." In the will as put forward by Miss Sugden, it is 100*l.* to her daughter Sophia, but it does not go on to say anything about a gold watch and chain. There was an inaccuracy with regard to this in Miss Sugden's original statement; but I shall deal with those several inaccuracies by themselves, and therefore now pass on to these several bequests as they appear in exhibit "J." The next is "Aug.," which evidently is intended for Augusta, "300*l.*" Then "Girls, 450*l.*" Then "Ht.," which is evidently intended for Harriet, "200*l.*" "Florence, 200*l.*" "Juliet P.," which is intended for Juliet Pearson, "100*l.*" And then there is another sum of 200*l.*, which is unappropriated by any initial put to it by Lord St. Leonards, but which Miss Sugden says was 200*l.* to her sister Caroline Turner. Then we have "Expenses and debts;" and opposite expenses is "2000*l.* Jt." That corroborates Miss Sugden's statement that the will contained this provision: "I further direct that my executors pay the sum of 2000*l.* to the trustees of the settlement of my daughter Juliet, made on her marriage with Kenneth Dixon, payable by my bond to the said trustees." Her statement explains how that comes to be put down under the head of "expenses and debts" instead of taking its place among the bequests to which I have already called attention.

Now, on the other side is the heading, "Kingsdown F., 300*l.* a year." That corroborates Miss Sugden's statement, that the will

1876

SUGDEN v LORD ST. LEONARDS.

Sir J. Hannen.

contained this provision: "That if my personal estate should be insufficient for the payment in full of the pecuniary legacies bequeathed by me and to discharge my testamentary and other expenses, until they shall have been fully paid my son Frank shall only receive 300*l.* a year out of the Kingsdown estate, the rest of the income to be applied to make up the deficiency." There does not only appear, in document J, "F., 300*l.* a year," but there also appears, "Legs." (legacies, that is), as being amongst the charges upon Kingsdown, in addition to the charge which is designated by the letters, "Rt. M., Q. A. B." (which, translated, means, "Robert Mann, Queen Anne's Bounty,") which is a confirmation of Miss Sugden's statement, that this passage was contained in the will: "I further charge my estate at Kingsdown with the annual payment due from my son-in-law the Reverend Robert Mann to Queen Anne's Bounty for the building of the vicarage of Long Watton, in Leicestershire." There, then, is to be found this, "Estates, 150*l.* per annum; three girls." I have looked at the original document, and I must say it appears to me that there was a word before the word "estate," the word "other." That has not been spoken to by any witness, and therefore it is a matter upon which I have exercised my own judgment. It seems to me to be the word "other," and that has been struck out at some time. If it did stand, as I think it did, "other estates," it would be consistent with what Miss Sugden says was the disposition in the will under this clause: "I give to the trustees of my said will three life annuities of 50*l.* each upon trust as to every of the same for the use of my said granddaughters, and I hereby charge the same on my Childerley Hall and other estates firstly hereinbefore devised." Now, we know that this was put down by Miss Sugden without consulting this document, and without having refreshed her memory; that word, if I am right in supposing it to have been "other" occurring there, would be a corroboration of her statement as to the estates upon which these annuities were charged. In the corner of that document is a note shewing that the late lord had made an estimate of what his personalty would be, as to which many observations have been addressed to me. The time when this was added to document "J" has been stated by Miss Sugden to have been later than the drawing of the will,

and it appears to me there is internal evidence of its being so, or at all events that there has been some addition made since. I find, "Edward, 720*l.*" I think it has become clear that that legacy was not given, as Miss Sugden supposed, by the will itself, but that it was given, as we now see, by one of the codicils, and I think it is equally clear that it was 700*l.*, and not 750*l.* With regard to the 20*l.*, I think that is probably not an error, as has been supposed, on the part of Lord St. Leonards, but that it was a computation by him of the proportionate payment of the allowance to the present Lord St. Leonards which he was in the habit of making, and reference to which is contained in the codicil as a thing to be provided for in the event of his death. I may say, in passing, so that I may not have to return to it, that I have not left unnoticed the argument against the value of this instrument, which has been based upon some omissions from it. It has been observed that it does not contain the annuity to the aged person as to which Miss Sugden has spoken. That is true, but it is to be observed that it was not charged upon any particular estate, and therefore, in the order of ideas which appears to have been present to Lord St. Leonards when he made these memoranda, it would not have its appropriate place, because it is an enumeration of charges upon Kingsdown and, as I read it, "other estates." Neither could it take its place amongst the legacies, because, as it was an annuity, its exact amount could not be computed; and, further, the lady being of great age, it was probably not treated as a matter of very great importance. But, undoubtedly no reason has been suggested for the omission of the 450*l.* legacy to the Misses Jemmett; that does not appear to have been put down by Lord St. Leonards upon this paper; but it may very well be, that after these various legacies had been put down, it may have occurred to his mind that what he had done for one set of grandchildren he would do for the others, and he may have added it to the will without adding it to the memorandum.

I next come to the document K. This is an enumeration of his several estates, drawn up originally in October, 1867, and to which certain additions in pencil have been made, probably at a later date, the most important thing being the bracketing of "my farm, Style's house and land, cottages, &c., ditto Crowther's cottage and

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

land, Wardrop's cottage," and the addition of the words "Charlotte for life," and then the figures 305*l.*, representing the exact amount of these rentals. That corroborates Miss Sugden's statement, that the will contained this provision: "I devise to my daughter Charlotte, for her life, my house and grounds at Thames Ditton, at present let to the Reverend F. Style, together with two cottages adjoining thereto, also St. Leonards Farm, together with the house on the said farm at present let to Mr. Lewis, and two small houses," to which she has added a condition to her own prejudice to this effect: "I direct that the said Reverend F. Style shall be at liberty to remain as tenant of the said house and premises during the life of my said daughter," a matter which Mr. Style himself proved the late lord promised him. There remains only one other memorandum in the hand of the testator himself, in which he speaks of the drawings in Charlotte's room as her own, the result of various purchases, and of the harp which was hers long ago, which, therefore, tends strongly to corroborate her statement that the will contained this provision: "I also give to her the harp, which was given to her by me some years ago, and I direct that she shall be at liberty to select and take out of her bedroom at Boyle Farm such ornaments and articles of furniture, many of which have been given to her by her mother and me, or purchased by herself, as she may think fit." I have now exhausted the testamentary, or quasi testamentary, documents in the handwriting of the testator, and I will now proceed to the next class of documents, namely, the letters of the testator himself previous to the making of the will. There is the letter of the 23rd of December, 1869, to his son, in which he says: "My dear Frank,—The conveyance to me of the Kingsdown estate is to be executed on Tuesday the 28th. I wish you to come here on the 27th; I intend to make some provision for you out of it. I will explain to you my intention in making a codicil to my will when I see you. I shall probably wish you to go to Kingsdown to take possession of the property, and I want to introduce you to the Rev. Mr. Hooper, who acts as a great authority here, and also to Mr. Flower, the solicitor, to whom I have let the shooting, so that you may be detained several days," and so on. Though, of course, it leaves it as a matter of uncertainty, what was the extent of the provision he intended to

make, it tends, and tends strongly, in my opinion, to support Miss Sugden's statement, that the will did contain the several provisions with respect to Kingsdown in favour of Mr. Frank Sugden, as to which, however, we have further evidence, which I shall deal with presently.

Then there is the letter of the 20th of October, 1870, in which he speaks of the trouble the place is giving him, but which I do not rely upon as evidence, because it was subsequent to the making of the will, and its value as evidence of adherence is small, because it was written at a time so shortly after the making of the will itself. The same observation applies to the letter to Mr. Flower of the 5th of February, 1870.

I now come to another set of documents, which, though of less value than those in the handwriting of the testator himself, are yet entitled to very great weight in an inquiry of this kind, namely, to what extent can unsuspected corroboration be obtained from other sources of the statements which Miss Sugden now makes? First, there is the letter of Miss Sugden of the 13th of January, 1870, the very day upon which the will was made. It cannot be conceived that Miss Sugden could then have anticipated such an investigation as this, and was writing down things which were contrary to the truth; they are contemporaneous statements made by her. These documents were properly admitted in their entirety, though, technically, they could only be used to refresh her memory; but they have been admitted, and can be referred to for the purpose of seeing the exact words she then used. On the 13th of January she says: "Papa has just finished his will and had it signed, and says his mind is now relieved, and he has not kept it in its old place for precaution sake. He has relieved Kingsdown of some of the annuities, but this is only for you." Observations have been made upon the expression "relieved Kingsdown." Of course, as Kingsdown had only been recently bought, and had not, as yet, been subjected to any actual charge, that would not be technically correct; but Miss Sugden explains it, and I think her explanation may be received without a shadow of a doubt, in this way, that she was there speaking of a change in her father's intentions; that, whereas he had expressed an intention to charge the annuities upon Kingsdown, he had altered

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

his mind; and indeed there is other evidence of that. That letter tends to confirm Miss Sugden's statement as to the clause in the will, which says: "I give to the trustees of my said will three life annuities of 50*l.* each upon trust as to every of the same for the use of my said granddaughters, and I hereby charge the same on my Childerley Hall and other estates firstly hereinbefore devised." Thereby shewing that he had relieved Kingsdown in the sense of having imposed that charge upon the other estates, instead of, as he originally intended, upon Kingsdown.

The next documents to which I will refer are of the same character, and the same observations are applicable to them as to the letters of Miss Sugden herself; they are the letters from Mr. Frank Sugden to his wife, written while this matter of the will was in contemplation, especially with reference to Kingsdown. Writing upon the 28th of December, he says:—"My father has been talking to me all the morning, and the trustees and attorney came to luncheon and to receive money, &c., &c., about the completion of the purchase of the Kingsdown estate, and they did not leave till four o'clock. My father means me to have, by his will, at first three hundred a year from the estate, the rest of the rent will go towards legacies, till they are paid off, and then that part of the rent will come to me also." Therefore there is a distinct statement of what his father had told him of the intention he had in his mind in reference to it, which strongly corroborates Miss Sugden's statement that there was that provision, which I have already read and need not repeat, with reference to the 300*l.* and the legacies. Then Mr. Frank Sugden goes on—"There will also be an annuity of 150*l.* a year on the estate to be paid away." Now that is what I had in my mind when I said there was other evidence that Miss Sugden's explanation of the word "relieved" was correct; because we have Mr. Frank Sugden here writing to his wife, and saying that the annuities of 150*l.* were to be charged upon Kingsdown. Lord St. Leonards appears to have changed his mind and to have relieved Kingsdown, and to have transferred those annuities to the other estates. Then Mr. Frank Sugden goes on, after stating what his ideas and expectations are as to the duration of the annuities and other charges—"and then the whole estate, free from everything except repairs, would belong to our

eldest son after my life. My father intends in the spring to begin to put the estate into repair. I go down there to-morrow, and I suppose that I shall return here on Thursday. It is possible that in my lifetime the estate may become valuable to us, but it removes from us anxiety about Frank being able to work earnestly in a profession for his own livelihood. The estate would go to him, and after him to his brothers (if he had no children) and supposing none of them lived the estate would go to the peerage, just as the estates of the peerage would come to our sons if their cousins did not live." That is evidently a statement of what he had just learnt from Lord St. Leonards as to his intentions. I need not go through them in detail; but to the mind of a lawyer it will be at once obvious that that which was contained in a whole series of dispositions, as stated by Miss Sugden as being in the will, was stated by Lord St. Leonards to his son Frank as his intentions with regard to the Kingsdown estate. Then, in his letter of the 1st of January, he says that his father had said to him—"I see one thing that the charges upon the estate will not last long, and then you will be a lucky man." And he goes on to say—"But do not mention this to Sophy, nor yet to Phil, for the will is not altered at present, though he told the former trustees of the property that it was not intended for the peerage, and gave them to understand that it was for me. He also has informed Edward that it was not for the peerage, and that this is irrevocable, but Charlotte says that I have been so unlucky she will not be easy till the will is made." Here is a direct statement not only that Lord St. Leonards had informed his son Frank of these provisions with respect to Kingsdown, and the devolution of the estate for some generations, but also that Lord St. Leonards informed him that he had told the present Lord St. Leonards of these dispositions, and that they were irrevocable. Of course the word "irrevocable" we know would not be used in the sense of its being impossible for his intention to be changed, but in the sense that his intention was that the present Lord St. Leonards must for ever dismiss from his mind the idea that Kingsdown was to come to him. Upon this point it is to be remembered, that the present Lord St. Leonards could not contradict this statement; he has not been called as a witness, and it must be accepted, and I

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

do accept it, without doubt. I have gone minutely and somewhat painfully through these various sources of corroboration of Miss Sugden's statement, and let me now state what is the result. In the first place, I will deal with the errors which appeared in Miss Sugden's original statement, as compared with the statement which she has since put forward, the latter statement being based upon the information which she has since had as well as ourselves. In the original statement she prefaced her enumeration of the various legacies to the members of the family in this manner: "Legacies of sums varying from 150*l.* to 300*l.* were left as tokens of love to different members of his family, and were, as nearly as I can recollect," and so on; so that she indicated that this was a matter as to which there was not an absolute certainty in her mind, as there was in relation to the more important things. In making that enumeration she has fallen into these errors (if we are to accept, as I do accept, exhibit J as a better guide than her memory): She has put down in her original statement 200*l.* to the daughter of Sophia Cleaveland, instead of 100*l.*, as it appears in Exhibit J. She has put down 200*l.* to Augusta instead of 300*l.*, and there is 100*l.* to Juliet Pearson, which is omitted; and in the enumeration of the daughters of Mrs. Reilly she has mentioned the names only of two, namely, Emily and Winifred, whereas there should be another, Kathleen. She has put down Kingsdown as being subject to a charge of 350*l.* to Frank, whereas, according to exhibit J, it should be 300*l.*; and, further, she has made the mistake of transposing the legacy of 700*l.*, as we now know it was to the defendant, from the codicil to the will itself.

Now, having regard to the nature of these bequests or devises, and provisions, it appears to me that that is a very small amount of error to have crept into a statement of this kind; but no doubt it is argued, and properly argued, that error being shewn in some particulars, it leaves the mind in uncertainty whether or not there may be error in others. Granted that one should use the fact that there are these errors with reference to other things as to which no corroboration can be obtained, yet surely the fact that some errors appear should not lead me to reject Miss Sugden's evidence in those cases where the accuracy of her memory is confirmed by the other documents, especially documents of such value as I think

these that I have referred to are entitled to be considered. I take it that, on the whole, the result of this examination has been to shew that Miss Sugden's memory is a very tenacious and accurate one, and that it may be safely relied on even in matters where she is not corroborated, if from the nature of the case I think it is unlikely she should have fallen into error in respect of those other particulars. Now let me shew what portions of Miss Sugden's statement have not been corroborated in the course of the investigation I have gone through. In the first place, she mentions the names of the trustees. There has been no corroboration of that; but that is a matter of small importance, and nobody could doubt she is accurate as to it. Secondly, there is the enumeration of the principal estates. There has been nothing to shew, besides her statement, what Lord St. Leonards meant by it; but that is a matter of fact upon which we can arrive at a pretty safe conclusion without any corroboration. There has been nothing to shew that the fire insurances were to be kept up by the trustees. There has been nothing to shew that the two cows and twenty-four plants were left to her. There has been nothing to shew that Boyle Farm was to be kept up for a month, and nothing to shew that the annuity for the aged person was provided for by the will. There has been nothing to shew who the executors were, or what was the amount of the legacy to one of the trustees, although there is a corroboration of the statement that there was a legacy of some amount to the trustees. Then there is nothing to corroborate her statement of the 150*l.* to the three Miss Jemmetts. There is nothing to corroborate her statement that Caroline Turner was the person to whom the unappropriated 200*l.* was left. There has been nothing to corroborate her statement with regard to the provision for the servants' wages, or with regard to the provision as to funeral expenses and manner of funeral. These, I say, have not been corroborated by any independent evidence, but they are matters really, with the exception of perhaps the 150*l.* to the Miss Jemmetts, of so trifling a character that they stand in need of no corroboration. There remain, however, two undoubtedly most important clauses in the will as put forward by Miss Sugden, as to which there is no independent evidence and no corroboration; I allude to the bequest of the residuary estate and the devises of

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

the estates in the event of the failure of the several limitations. There is no doubt that those are most important portions of the will, and the question which I have now to determine is whether, in the absence of such corroboration as I have sought for, and as I think I have found, for all the other important provisions, I am to hold that Miss Sugden's memory is to be relied upon as to these.

Now there is much force in the arguments that have been addressed to me by Mr. Thesiger with reference to the several legacies which are left to the various members of the family. He has pointed out that to two of these ladies who are said to have been the residuary legatees, together with Miss Sugden, there are bequests to the one of 300*l.* and to the other 200*l.*, before we come to the residuary clause. No doubt it is a subject of observation that trifling legacies of this kind should be given to persons who were to take so large a benefit as we have heard by a third of the residue; but Mr. Thesiger has candidly said that this is only one element in the consideration. It is obvious that the process Lord St. Leonards was going through when he drew up paper J, was to jot down the various persons whom he desired to notice in his will, to shew that he had not forgotten them, and was leaving them what has been termed complimentary legacies. It may well be that after he had put down those various small legacies, he then began to consider in this way:—"Having remembered all, or nearly all, the members of my family in various ways, leaving them small sums or articles in token of my affection, what shall I do with my residue?" And then exercising a choice and selection, which he was entitled to do, and with the motives for which we have no concern, he fixed upon these three of his daughters, to the exclusion of the others. All I can say upon the subject is this, that the result of this examination has been to give me such confidence in the accuracy of Miss Sugden in all important matters, that I think her memory is to be relied upon, although it is not corroborated with regard to the residuary bequest. The observations which are applicable to these several errors which I have pointed out, are not applicable to so important a matter as the disposition of the residue. It is a subject which of course would be calculated to attract Miss Sugden's attention. It is a

matter in which she would be deeply interested, not only for herself, but also for her sisters; as well those who were to take a benefit with her, as those who were to be excluded from it; and since she says she has a distinct recollection that it was she and her two sisters who were the residuary legatees, I come to the conclusion that she is to be relied upon, and I find as a fact that that was the bequest with reference to the residuary estate.

This brings me to the end of the observations which I have to make upon the subject of the contents of the will, with the exception, indeed, of the bequest which Miss Sugden alleged there was to Lord St. Leonards. That, I have said, I should allow the amendment of. I find, therefore, as a fact, that the contents of the will were as set out in the declaration, with the exception of the bequest of 750*l.* to the present Lord St. Leonards; and I direct that an amendment be made by striking out so much of the statement contained in the declaration as relates to that bequest.

I now pass on to the second branch of the case, namely, whether or not this will has been revoked by the testator himself? This is a question of fact. Undoubtedly where a will is shewn to have been in the custody of a testator, and it is not found at his death, the presumption, in the absence of evidence to the contrary, is that the testator himself destroyed it. But that presumption may be rebutted by evidence leading to the conclusion that the testator did not do that, which, in the absence of evidence to the contrary, it is presumed he had done. That evidence must necessarily be of great variety according to the various circumstances of the cases that are presented to courts of justice. Sir Henry James has argued that there was some particular standard which must be attained by the evidence in order to justify the Court in acting upon it; but I have not been able to collect from his very able argument, or from the other arguments which have been addressed to me, what that particular standard is. It must necessarily vary according to the circumstances of the case. I have already said that the first element in this consideration of whether or not a testator has destroyed his will is to be found in the instrument itself. I must now, for the purposes of the rest of my

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

observations, take it as proved that the contents of the will were as Miss Sugden says they were. Well, then, this appears to be a will well considered, dealing with the interests of a large number of his family, settling certain estates upon the peerage, settling other estates upon his second son, accompanied by declarations of the testator to those interested, especially to the present Lord St. Leonards, that what he was about to do was the fixed determination of his mind, and I have to consider whether it is probable that he would at some subsequent time change the intentions which he had then formed. When it is suggested that such a change has come over the mind of the testator we must look for the cause of such a change. Was there any in this particular case? It appears not only from the parol evidence, but it appears from the various codicils, that Lord St. Leonards ceased to entertain as strong an affection for his grandson, the present Lord St. Leonards, as he did presumably entertain at the time of the making of this will. He thought, and we have nothing to do with the justice or injustice of his reasons for so thinking, that he had to complain of his grandson's conduct. I have already said, and desire emphatically to add to that which has been stated by the various counsel in the case, that having had some opportunity beyond what has been openly stated in Court, by reading certain letters, of knowing exactly what were the causes of Lord St. Leonards' displeasure with his grandson, there is nothing in those causes which in the least degree reflects upon the defendant's character. There were differences of opinion which might naturally be expected to arise between a young man of twenty-three and an old man of nearly ninety. But of course we have nothing to do with such considerations as that; Lord St. Leonards was entitled to act upon his own view of what was right and proper or expedient for his grandson to do in reference to any matrimonial engagements.

Let me continue and conclude this portion of the case in reference to Lord St. Leonards' feelings towards the defendant. It does not appear that there was any reason why Lord St. Leonards should change his views, because, although it has been stated that the second engagement of the defendant was broken off in the year 1874, yet it does not appear that it was ever communicated

to Lord St. Leonards, or that it occurred at a time when, as I shall shew presently, it will be necessary to shew it did take place if we are to take it into account as having influenced Lord St. Leonards' mind. On the other hand, we find his affection for his daughter, Miss Sugden, naturally increasing with the months and years. As he became more and more dependent upon her so did he become more and more anxious to shew the gratitude that he entertained towards her.

Also with regard to his son, Mr. Frank Sugden, he never had any difference with him, and the codicils shew that he desired more and more to benefit him, and to make him, as Miss Sugden stated he said he would do, the head of the family, by placing him in Boyle Farm, with a sufficient income to maintain it. There is, therefore, a total absence of assignable motive for Lord St. Leonards revoking the all-important provisions of the will of 1870. I am not now dealing with small matters, but I will take, for example's sake, the disposition of Kingsdown in favour of Mr. Frank Sugden. It seems to me impossible that anybody can doubt, however his interests may bias his views, that that will of 1870 contained the dispositions which Miss Sugden says it did, of Kingsdown in favour of Mr. Frank Sugden, and his first and other sons in succession in tail male; and I presume I am not asked to doubt the fact that it contained the several dispositions she has mentioned with reference to the peerage estates. Why then, at any time afterwards, can it be argued, should Lord St. Leonards make any change in the disposition in favour of Frank? He, it is true, had given him another estate by one of his codicils, and that he had also given him Boyle Farm, in order that he might assume the position of the head of the family; as to Boyle Farm, though it might be probably let for a considerable sum, it is not probable that was the view with which Lord St. Leonards left it to his second son; and if it was to be used as he had used it, as a residence, then no doubt, it is a place which would cost much to keep up, and which would require a considerable income properly to maintain it. I think, therefore, there are reasons why Lord St. Leonards should do as Miss Sugden says he did, namely, leave unaltered the disposition of the other estate to Mr. Frank Sugden, in order that he might maintain the

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

position of head of the family at Boyle Farm. Now, in the absence of any reason why Lord St. Leonards should change his mind in reference to Mr. Frank Sugden, what is there in the evidence to shew that he ever did change his mind? There has been given a considerable body of testimony as to his subsequent statements, which upon this part of the case are, without doubt, admissible in evidence. It has been shewn that down to the latest period of his life when he had conversations upon such subjects, he invariably spoke of Kingsdown as having been left to Mr. Frank. In January, 1874, Miss Sugden states that there was a conversation upon the subject, in which the peerage estates were referred to; Kingsdown as going to Frank, and Tilgate, to his grandson Henry; and also as to the property that had been given to Miss Sugden herself. This appears to me to be an exceedingly important conversation; it shews a natural course of thought in Lord St. Leonards' mind upon the subject of his various estates, because Miss Sugden says it arose à propos of a then contemplated measure of land transfer. Lord St. Leonards spoke of the difficulties in the way of acquiring and dealing with land being exaggerated, and he said by way of illustration: "In the case of my own family, there are no less than four of you who are in possession of land, there are the Peerage Estates, Kingsdown for Frank, Tilgate for my grandson Henry, and your nice little property." That, as I say, shews not only a clear adherence to the will as Miss Sugden says the will was drawn, but it shews this was not a wavering state of mind upon Lord St. Leonards' part; it was a distinct statement by him with discrimination as to the manner in which his several properties would pass. And the circumstances under which it arose appear to me to give it greater credibility. It is a perfectly natural way in which such a conversation would arise between father and daughter; and trusting as I do, completely, to the integrity of Miss Sugden, and so excluding the possibility of invention on her part, it appears to shew most satisfactorily that in January, 1874, he believed that a will by which Frank would take the Kingsdown estate, was in existence. Mrs. Turner also says, that in November, 1874, which is still later, and approaching the time of Lord St. Leonards' death, her father said to her, Kingsdown would be a nice place for his son

to live in. That is a plain allusion to the devise, which, as I have said, I find as a fact, was contained in the will. I pass over those several witnesses who spoke to conversations at an earlier period. Mr. Frank Sugden himself must be passed over on this head, since he does not speak to any distinct conversations upon the subject of Kingsdown subsequently to May, 1872, although he says, generally, there was never anything at any time which led him to suppose that there had been any change in his father's intentions towards him. Hobson, the gardener, who was a witness in a different class of life, gave his evidence to my complete satisfaction. I certainly believed he was speaking the truth; and he also gives an account of a conversation arising in a perfectly natural way; he says, in May, 1874, when he had occasion to go to Lord St. Leonards' bedroom to consult him about some gates which he was to put up for Miss Sugden's house, Lord St. Leonards then spoke not only of the house for Miss Sugden, but he spoke of Kingsdown for Frank, to which the witness says he made answer: "Yes, my Lord, you have told me that before." Lord St. Leonards appears to have been in the habit of making these statements to the persons who were about him; it being a subject in which he took naturally a great interest. Then Carroll, who came there only in January, 1874, says he had many conversations with Lord St. Leonards, in which Lord St. Leonards alluded to Frank in connection with Kingsdown as his future property. Elizabeth Fryer, who came in February, 1873, says that Lord St. Leonards, when she was in conversation with him whilst in attendance upon him, frequently said that he had left Kingsdown to Frank. Northwood, the nurse, who came there on the 12th of March, 1874, says he said, "Kingsdown is my estate at present;" and she says he said (because it is important to notice the peculiar expression this witness made use of) "but I have given it, or rather shall give it to my son Frank, and to his son after his death." That expression—"or rather shall do so," I suppose, though it has not been touched upon, might be alluded to as indicating an intention in future. I, however, come to the conclusion, that it refers to the fact that he had done it by will, and that the property continued his at present, meaning to exclude any notion that he had actually given it to his son.

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

Now these conversations, these statements and declarations, which I have referred to are all, as it will be seen, late in the testator's life; the first that I have mentioned being in January, 1874, and the others coming down to within a few days of his death, and at many times between those two dates. This has a most important bearing upon the question of whether the testator had revoked the will or not, because it is to be remembered that this will was in the will box, kept in the saloon which the testator was in the habit of using as his sitting room; that the will was actually seen by Miss Sugden on the 20th of August, 1873, that on the 20th, or about the 20th (it is not material to a day) of the following March, Lord St. Leonards took to his room, and never quitted it again until he died, during which time the will box was in Miss Sugden's custody in her room, and therefore it was in such a position that Lord St. Leonards could not have access it. Therefore, seeing that the will was in existence in August, 1873, and that he could not have had access to it after March, 1874, the period of time during which he could have revoked it is limited to those months; and, indeed, it is further limited in this respect, that Lord St. Leonards was taken ill in September and went to his room for a few days; he was taken more seriously ill about the 1st of October, and kept his room until about the 22nd or some later day in December, before Christmas Day, during which time, also, in addition to his not being able to have access to this will box, since he was in his room, Miss Sugden had taken possession of it and carried it to her own room. There is, therefore, a still shorter period during which it is possible to conceive that Lord St. Leonards obtained access to the will and destroyed it. But, as I have shewn, in January, 1874, he distinctly alluded to the contents of the will, and on those several occasions down to the time of his death he alluded to that main provision which I have taken as an example, the devise to Mr. Frank Sugden and his family.

Now, before I comment upon that, and the inference I draw from it, I will rapidly touch upon the statement made in relation to the residuary bequest. Miss Sugden refers to the several occasions, during the year after the making of the will, when he referred to it, notably in May, 1872, when he offered to give her

Boyle Farm, and she then said the residue was given to her and her two sisters, to which he made no objection. That would be an adherence, with less force no doubt, but still it would be evidence of adherence that he made no objection to such a statement on her part. Then Miss Sugden says, that in November, 1874, there was a distinct conversation with regard to the residue, in which she said it would be about 10,000*l.* a-piece to which he answered that was what he wished exactly; and when he received his pension he said it would be a nice addition for her and her sisters; and on the latest occasion when he received his pension, within a few days of his death, he repeated that which Miss Sugden says was a common phrase on his part, that he was pleased so much was coming to her and to her two sisters; and that allusion was made to the residuary bequest in her favour and that of her sisters as late as January, 1875. Mrs. Turner's evidence upon this point is undoubtedly not of great value, because it only amounts to this, that the testator spoke of having left her, Mrs. Turner, very well off. Certainly, if that alluded to the legacy of 200*l.* it would be an absurdity, and he must therefore have alluded to something more important than that legacy. She also says that he said Miss Sugden would be well off. Those are, however, general expressions, to which I do not attach much importance, because no doubt, as has been argued so forcibly, there would be a considerable sum coming to Miss Sugden, which the testator might think, added to her 6000*l.* legacy (if it is to be taken there was such a legacy), would make up a very handsome sum. The evidence of Hobson does not touch this point, because it is only as to general expressions on the part of Lord St. Leonards as to Miss Sugden being well off. Isabella England, the nurse, says he said he had provided for her future residence, and had provided well for her along with it. With regard to his continuing affection for Miss Sugden it is well to turn to the evidence of Elizabeth Fryer, who gives a somewhat touching narrative of what occurred quite late in his life when alluding to his daughter. I will not take up time by reading the passage, but it is one in which he prayed that she might be blessed for all the kindness she had shewn him, and concluded emphatically by saying, "And she shall be blessed." The nurse Northwood said that he said he had provided for Miss Sug-

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

den, and she would be very rich after he was gone. I have now gone through all these passages which Mr. Thesiger has referred to; and it is due to the argument which he has urged before me, to say that my examination bears his out, that in none of the declarations is there a distinct statement with reference to the residue; it is all contained in those general words I have referred to, there is nothing more specific with regard to the residuary bequest. But, as I say, of his unceasing and his growing attachment for Miss Sugden down to the last there can be no doubt.

There remains this state of things for me to deal with: evidence, which I accept as true, that down to the latter months of his life, and long after it was possible for him to have access to the will-box or the will, he was expressing his adherence to the devise of the Kingsdown estate to Mr. Frank Sugden, which, as we know, was contained, and contained only in the will of 1870. There are these allusions, such as they are, to his having benefited Miss Sugden and her two sisters; there are the general expressions with regard to her, and, further, there is the fact that he alluded to the annuity in favour of his brother's widow, which he had been paying for forty years, and which he desired should be continued after his death, concerning which there seems to have been some degree of secrecy, since he did not put the name into his will; he referred to it as being something that he had done, and which it gave him satisfaction to think he had done. These statements lead me to the conclusion that at the time when they were made by the testator, he believed that his will of 1870 was still in existence. But it is said, if that is the case, what is the theory which is to be put forward as to the disappearance of the will? I am not called upon to suggest any theory which would account for the will not being found at the testator's death. Several theories of various degrees of plausibility might be suggested, but I carefully and purposely abstain from putting forward any theory of my own on the subject. It is sufficient for me to say that believing, as I do, the testator made these statements, shewing a belief in his mind that the will was in existence at a time subsequently to that at which he could have revoked it, I am led to the conclusion that he had not, in fact, revoked it at any time when he had the opportunity of getting access to it. To adopt any other view would be

to hold one of two things which appear to me to be equally untenable, either that Lord St. Leonards had in fact destroyed the will upon one of the occasions upon which, no doubt, he might have had access to it between August, 1873, and March, 1874, but that he had forgotten he had done it; or, on the other hand, I must assume that, having done it, he, who through so many years had made Miss Sugden the confidante of all his thoughts and all his business transactions, purposely concealed from her the fact that he had done an act so much to her injury, while he kept up the semblance and pretence of an undiminished affection and interest towards her, which would be inconsistent with the idea that he had done anything so greatly to the detriment of the position in which he had placed her. Equally unlikely is it to be observed that he would, under those circumstances, have kept concealed from Mr. Frank Sugden the fact of the great change in his prospects and the prospects of his family which had been worked by a revocation of this will. In addition to that, it appears to me wholly impossible to believe that Lord St. Leonards, with his knowledge upon such subjects, with the pride which he manifested in doing things as he thought in the right way, even to vanity, should have destroyed this will, knowing, as he must have done, the confusion he would throw his affairs into, and the certainty there would be of bringing about that litigation which he so frequently expressed a desire to avoid. If I were to accept the theory that he took out this will with the idea of altering it, I should then rather come to the conclusion that, with the idea of altering it, he had lost it, having so taken it out, rather than that he had taken it out to destroy it. That he, having made this disposition of his property, should take out the will and destroy it, without substituting in its place any other disposition, above all that he should keep that destruction concealed from all those about him, is what I cannot believe. Having now resting upon me the responsibility of coming to a conclusion upon this question of fact, I come rather to the conclusion that his declarations down to the latest period of his life shew that he died under the belief that that will was still in existence, and rebut the presumption that he had revoked it.

Now let me, in conclusion, call attention to a passage in Lord

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

St. Leonards' own work which has a bearing upon this subject, and it shews how the wisest of men may be mistaken, as I think, in the advice which they give to others. I may also say this case illustrates the false security in which Lord St. Leonards lived, and in which I dare say almost all of us live. He and the other members of his family believed that this will was secure from the hands and eyes of either the curious or dishonest. It was thought that the only means of access to it was by the use of the key which Lord St. Leonards carried about him, and that there were no means of access to any other key which would open the box, whereas in fact it turned out that there were no less than four keys in that house by which anybody so minded might have opened the escritoire, and so have obtained access to the key which would open the will box. I was about to call attention to what Lord St. Leonards says upon another subject. Believing as I do that this will has been lost, and not destroyed by the testator's hands, that the loss has arisen from the insecurity of the custody, safe as it seemed to all concerned, in which it was placed, it is well that it should be known—and I particularly desire that it should be made public—that the law has provided a means of obtaining as nearly a certainty as can be obtained in human affairs, that a will will be forthcoming at the death of a testator, because it has been provided by 20 & 21 Vict. c. 77, s. 91, that wills may be deposited at the registry of this Court, sealed and sacred, so that their contents will never be known to any one until the proper time arrives, namely, the death of the testator. Upon the payment of a small fee, as I have said, wills may be deposited at the registry of the Court, and there kept with almost certain security until the proper time arrives for the opening of them; yet I regret to say that, during the year 1872–73, there were only seven instances of this opportunity being made use of. During the year 1873–74 there were nine cases; in the year 1874–75 there have been seventeen instances. Lord St. Leonards, observing upon this, says, in his Handy Book on Property Law, p. 261, the Act which establishes this Court "provides not only for the custody of your will after your death, but directs that convenient depositories shall be provided, under the control of the Court, for all such wills of living persons as shall

be deposited therein for safe custody, and that all persons may deposit their wills in such depository upon payment of such fees and under such regulations as the judge of the Court shall by order direct. If you are likely from time to time to alter your will, I should advise you not to place it in this depository, for the will deposited must remain there until your death." I think it is to be regretted that that advice was given, because if a will is deposited at the registry it still would be open for anybody to alter his will.

That brings me to a conclusion of the observations I have to make; and the result is that I find, as a fact, that the will of 1870 was duly executed and attested; that the several codicils were also duly executed and attested; and I further find that the contents of the will were as set out in the declaration, with the exception I have mentioned. That brings to a conclusion the duties which I have to discharge in this case to-day.

On the 7th of December, an ex parte application was made to the Court on behalf of Lord St. Leonards to extend the period of fourteen days, limited by the Probate Court Rules of July 30, 1862, for applying for a re-hearing. The Court enlarged the time to the 14th of December, and on that day, no application for a re-hearing having been made,

Hawkins, Q.C., moved the Court to pronounce for the contents of the will as contained in the amended declaration, limited until the original or a more complete copy should be found, and also of the eight codicils.

SIR J. HANNEN (President). There is a demurrer on the record, and the matter must stand over until the demurrer is disposed of.

Dec. 21. SIR J. HANNEN (President) delivered the following judgment:—

On the trial of this cause I disposed of the issues of fact. No question of law arose on that occasion. I found the several issues in favour of the plaintiffs, and I am now asked, on the basis of those findings, to pronounce for the will and codicils propounded.

1876

SUGDEN v. LORD ST. LEONARDS.

Sir J. Hannen.

The defendants have appeared by counsel and formally opposed the plaintiff's application, but no reason has been suggested why my decision upon the facts should be set aside, or why I should not make the decree prayed for.

I have, however, first to dispose of the demurrer to defendants' 5th plea. That plea is as follows:—

"That the said codicils respectively were intended by the said deceased to be dependent upon and operate in conjunction with the will in the declaration mentioned, and to have no force or effect apart therefrom, and together with such will to form, and does form, one complete testamentary instrument and disposition, and that the said deceased duly revoked the said codicils respectively by destroying the said will with the intention of revoking the said complete testamentary instrument and disposition."

The plaintiffs demurred to this plea, on the ground that it does not aver that the codicils have been revoked in any of the modes indicated by 1 Vict. c. 26, as the only modes by which testamentary papers can be revoked. I have found that the plea was not proved in fact. As the demurrer has not been argued before me, I do not think that I am called upon to give my reasons in detail for the judgment I am about to pronounce, and I shall confine myself to the simple statement that, in my opinion, the plea is good in law. I therefore overrule the demurrer, and pronounce for the will and codicils propounded.

With regard to the costs of the suit, I think that the loss of the will must be regarded as a misfortune which rendered this litigation necessary, and I therefore allow the costs of the defence out of the estate, but I see no reason for departing from the ordinary rule of the Court that one set of costs only be allowed, as the interests of the several interveners, though different, were not conflicting with those of the defendants, and did not require different evidence, if evidence had been given in opposition to the will or codicils, or call for different arguments.

The order made on the 25th of November (so far as material) was as follows:—"This Court doth order that the declaration

filed in this cause be amended, and, the same having been amended at the sitting of the Court, this Court doth find that the Right Honourable Edward Burtenshaw, Lord St. Leonards, the deceased in this cause, made and duly executed his last will and testament, bearing date on or about the 13th of January, 1870, and that the contents thereof were in substance or to the effect set forth in the third paragraph of the declaration as amended; and that the said deceased also made and duly executed eight codicils to the said will" (mentioning their dates), "the said will and codicils having been propounded in this cause on behalf of the plaintiffs, the executors therein named, and that the said will and codicils were not, nor were either of them, revoked at the death of the said deceased."

The decree or order made on the 21st of December, 1875, was (so far as material), as follows:—"It is ordered by the Court that the demurrer of the plaintiffs to the 5th plea of the defendants be overruled, and pronounced that the said 5th plea was good in law and, on the application on behalf of the plaintiffs for a decree, this Court doth pronounce and declare for the force and validity of the last will and testament of the Right Hon. Edward Burtenshaw, Lord St. Leonards, the deceased in this cause, bearing date on or about the 13th of January, 1870, and for the contents thereof as in substance or in effect set forth in the third paragraph, as amended, of the declaration filed in this cause on behalf of the plaintiffs, and also for the force and validity of the eight codicils to the said will."

On the 20th of January, 1876, the testator's grandson, Lord St. Leonards, and his brothers and sisters, gave notice of appeal from so much of the judgment and decree of the President of the Probate Division as pronounced for the force and validity of the will of the 13th of January, 1870, and for the contents thereof, as in substance or in effect set forth in the declaration, and for the force and validity of the eight codicils.

An appeal was also brought by Mr. and Mrs. Henderson. The appeals came on to be heard on the 7th of March, 1876. On the opening of the appeals,

Hawkins, Q.C., *Inderwick, Q.C.*, and *Dr. Tristram*, for the plain-

1876

SUGDEN v. LORD ST. LEONARDS.

tiffs, took the preliminary objection that there could be no appeal from the finding of the Probate Court on the questions of fact.

The appeal must be limited to questions of law arising upon the decree pronounced on the 21st of December, the previous finding of the President on the 25th of November being taken as conclusive. That finding is like the finding of a jury; it is conclusive, unless the proper steps have been taken to set it aside. The proper course would have been to apply to the judge for a re-hearing under Rule 60 of the Probate Court Orders of the 30th of July, 1862, which rule provides that "An application for a re-hearing of a cause heard before the judge without a jury, and in which evidence has been given vivâ voce, may be made by motion within fourteen days from the day on which the same was heard." Rule 89 enables the Court to extend the time for making the application. Here the plaintiffs applied for and obtained an extended time, but they made no application for a re-hearing within the extended time—s. 35 of the Act (20 & 21 Vict. c. 77), regulates the mode of trial, and s. 39 gives a right of appeal to the House of Lords. By the Judicature Act of 1873, the jurisdiction of the Probate Court is transferred to the High Court of Justice, and s. 22 of that Act provides that causes pending when the Act came into operation shall be continued in the High Court and the Court of Appeal according to the old or the new procedure as the Courts may think fit to direct. Under this section the President of the Probate Court made an order that pending causes should be continued according to the old practice. Then s. 18 of the Judicature Act of 1875 provides that the Rules and Orders in force in the Probate Court at the commencement of the Act are to remain in force in the High Court until altered or amended. Section 19 of the Act of 1873, it is true, provides that the Court of Appeal shall have power to hear appeals from any judgment or order of the High Court (with certain exceptions), but this finding on a question of fact is not a judgment or order of the Court.

5 Ch D. 590

[MELLISH, L.J. Order LVIII., Rule 14, of the Rules of the Supreme Court, provides that "no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the

appeal as may seem just." The object of this was to prevent parties being prejudiced by their having omitted to appeal from an interlocutory order. The whole thing was to be open on the merits before the Court of Appeal. We have held in several cases that, till an appeal is brought, there is nothing pending in the Court of Appeal.]

But our contention is, that the finding on the facts is not an order of the Court at all.

[JESSEL, M.R. All orders made by the judges of the Court of Chancery were made in this way, and yet it was never doubted that an appeal could be brought from their decisions both on the facts and on the law.

JAMES, L.J. Your argument is that the verdict of the judge is binding to the same extent as the verdict of the jury would have been if the cause had been tried by a jury.]

That is our argument.

[COCKBURN, C.J. At present I fail to see any distinction between the findings of fact when made by a jury and when made by a judge.

JESSEL, M.R. I understand Rule 60 of the Probate Orders to be only potential. It does not say that if no application is made for a re-hearing the parties are finally bound.]

Then Order XXXIX., Rule 1, of the Rules of the Supreme Court provides that, in order to obtain any new trial of any cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions, an application must be made for the purpose to a Divisional Court. This rule does not apply in terms to the Probate Division, but the Probate Court rules remain in force. *Tommey* v. *White* (1) supports our contention, and so does *Fernie* v. *Young*. (2) In that case questions of fact had been tried before a Vice-Chancellor without a jury. He made certain findings of fact, and his decree, dated some days afterwards, referred only to the findings and not to the evidence upon which they were based. It was held that the House of Lords could look only at the decree, there having been no motion for a new trial. In the present case the appeal is against the decree only; there is no appeal from the findings.

[JAMES, L.J. If there had been a change of the individual

(1) 6 Cl. & F. 786. (2) Law Rep. 1 H. L. 63.

1876

SUGDEN v. LORD ST. LEONARDS.

judge between the finding of the facts and the subsequent decree, the new judge would have had to base his decree upon the findings of his predecessor.

COCKBURN, C.J. If a case were tried at the assizes, as is often done, by a judge without a jury, and an application were afterwards made for a new trial on the ground that the finding of the judge was against the weight of the evidence; if the Court thought the finding of the judge wrong, still it could only order a new trial.

MELLISH, L.J. In the Court of Chancery there was always an appeal on the facts as well as the law. Now, the same rules apply to all the Divisions of the High Court. If, then, we accede to your argument, shall we not, in effect, be holding that there is no longer any appeal from a decision of a Vice-Chancellor on a question of fact?]

Our argument is founded mainly on the Probate Court Rules, which, we say, remain in force. Rule 60 provides for a re-hearing only when the evidence has been given vivâ voce. If the evidence had been given by affidavit there would be no object in having a re-hearing by the same judge, because the written evidence would come before the Court of Appeal just as it did before the judge at the original hearing, whereas in vivâ voce evidence a great deal depends on the demeanour of the witness.

Sir H. Giffard, S.G. (*Dr. Deane, Q.C.*, and *Bayford* with him), for Lord St. Leonards, and some of his brothers and sisters. The Court of Probate, like the Court of Chancery, had jurisdiction to try questions of fact without a jury. In the courts of common law this was not so; the issues of fact were found by a jury, and the courts determined the questions of law. The consequences of this was, that in the Court of Chancery appeals, or rather re-hearings, could be had of decisions in questions of fact, and the Court of Probate stood in a similar position. *Fernie* v. *Young* (1) depended entirely upon the provisions of the Chancery Amendment Act, 21 & 22 Vict. c. 27.

[JAMES, L.J. The judges of the Court of Chancery exercised a larger discretion as to directing a new trial than a judge at common law could do.

(1) Law Rep. 1 H. L. 63.

JESSEL, M.R. The judges of the Court of Chancery acted without reservation by the judge at the trial, because it was their own issue.]

Under the Chancery Amendment Act the judge was expressly placed in the position of a jury, and his finding in that character was binding in the same way as that of a jury would have been. Under the Probate Act and rules, no issues are directed when the judge hears the case without a jury. The 59th rule of the Probate Court Orders provides for a new trial of an issue tried before a jury; the 60th rule provides for a re-hearing of a cause which has been tried by the judge himself. And now under the Judicature Acts and Rules all the decisions of all the Divisions of the High Court may be appealed from. The decision of the judge on the facts was a decree in the cause. The only reason why the final decree was not at once pronounced was that the demurrer was pending.

[JESSEL, M.R. The rule as to re-hearing means a re-hearing of the whole cause.]

Yes. There is only one proceeding before the judge, and in an ordinary case, where there was no demurrer, the decree would be pronounced at once when the question of fact had been decided. No further argument would take place.

[JAMES, L.J. There was only one hearing in *Fernie* v. *Young*. (1)]

But the decision of the House of Lords depended entirely on the enactments of the Chancery Amendment Act, and there is no analogous legislation with regard to the Probate Court.

[MELLISH, L.J. Would there, before the Judicature Act, have been an appeal to the House of Lords from a decision of the judge of the Probate Court on a question of fact?]

Yes, there would. If this objection is to prevail we shall be deprived of the power of appealing by a mere technicality.

Thesiger, Q.C., and *Bayford*, for brothers and sisters of Lord St. Leonards.

Davey, Q.C. (with whom was *G. Browne*, and *Keogh*), for Mr. and Mrs. Henderson. The fallacy in the argument of the plain-

(1) Law Rep. 1 H. L. 63.

1876

SUGDEN v. LORD ST. LEONARDS.

tiffs is this: there was no direction for the trial of any issues of fact; it was the hearing of the cause. The form of the order of the 22nd of June shews this. The Probate Rules distinguish between the hearing of the cause by the judge without a jury, and the trial of issues by a jury. In the latter case, Rule 52 provides that the issues between the parties are to be prepared by the party declaring and settled by one of the registrars. There were not two proceedings in this case; a trial of issues, and afterwards the hearing of the cause, as in *Fernie* v. *Young*. (1) There was only one proceeding, the hearing of the cause. *Fernie* v. *Young* (1) is really an authority in our favour. If in that case, instead of issues having been directed to be tried, the Court had heard the cause upon affidavit, or upon vivâ voce evidence, the Court of Appeal and the House of Lords would have felt no difficulty in reviewing the decision of the judge on the evidence as well as on the law.

[JAMES, L.J. What is the meaning of the words "evidence given vivâ voce," in Rule 60?]

The Court, after hearing the vivâ voce evidence, might wish to read over the shorthand writer's notes of it, and to have an opportunity of considering the effect to be given to it.

[MELLISH, L.J. Fresh evidence might have been discovered, or one of the parties might have been taken by surprise by some particular evidence adduced by the other party. These would be grounds for a re-hearing, not for an appeal.

COCKBURN, C.J. You say that you may apply to the judge upon the chance of his reversing his former decision, but it is not obligatory on you to do so. You may, if you please, appeal at once to the higher Court.]

That is what is suggested.

COCKBURN, C.J. I think we have all now come to this conclusion, that it is optional with the parties, if they think it would be advantageous that the judge should reconsider the evidence with a view to the decision of the facts, to apply to him for that purpose; but it is not obligatory on them to do so. They may, if they please, treat his decision on the facts as a final decree in the cause and appeal from it at once.

(1) Law Rep. 1 H. L. 63.

JESSEL, M.R., JAMES and MELLISH. L.JJ., and BAGGALLAY, J.A., concurred.

The evidence was then read, and the argument proceeded on the merits.

Sir H. Giffard, S.G. (*Dr. Deane, Q.C.*, and *Bayford*, with him), for Lord St. Leonards. Probate cannot be granted of that which is admitted to be imperfect, which is admitted not to be the whole of the will. It is admitted that the will contained some legacies (the amount does not signify) which are not disclosed in the document which is propounded for probate. It is admitted that there were ultimate remainders limited of the real estates which Miss Sugden cannot remember. There is a difference with respect to legacies of personal estate and limitations of real estate. Before the Probate Court Act of 1857, a person to whom, for instance, a life estate in land was devised could have recovered in ejectment against the heir, the question of the subsequent limitations being left undetermined. But under the Probate Court Act, the heir is cited and is bound by the probate in respect of the whole instrument. As to the legacies, to the extent to which they are omitted and the residue thereby increased, the intentions of the testator are defeated by admitting the document to proof.

[JAMES, L.J. If a legacy fails from any cause, that enures to the benefit of the residuary legatee. The next of kin have no interest in the question.]

The question is, whether this document is that which the testator intended to operate.

[COCKBURN, C.J. Suppose a will to have been partly destroyed by fire or otherwise, is no effect to be given to that part which is left?]

If a material portion had been destroyed, the effect of which could not be ascertained by other evidence, the part which remained could not be admitted to probate. There is no case in which a portion of a will has been admitted; in every case of the kind the substance of the whole will has been proved.

[JESSEL, M.R. Is there any case in which a portion of a will has been offered for probate, and probate has been refused?]

1876

SUGDEN v. LORD ST. LEONARDS.

In *Montefiore* v. *Montefiore* (1), probate was refused of an instrument which had been written to a certain extent by the testator, but not finished.

[JESSEL, M.R. You could not tell what he intended to write before he had finished writing.

JAMES, L.J. The ratio decidendi was that the Court was not satisfied that there was evidence that the testator had come to a final resolution.]

The principle was that the Court must be satisfied what the intentions of the testator were. If a part of a will be struck out, to that extent you are doing that which the testator did not intend to do. In this case it is said that the omitted legacies were of trifling amount, but the same principle would apply if they had amounted to two-thirds of the estate. The duty of the Court is simply to give effect to the testator's will. Then, in the second place, there is not sufficient evidence to rebut the legal presumption that when a testator's will has been traced to his custody, and it is not to be found at his death, he has destroyed it animo revocandi. In the absence of evidence, the Court will not presume that the will has been abstracted fraudulently or criminally.

[COCKBURN, C.J. You must take into account the improbability of a man like Lord St. Leonards destroying his will, and doing so with the intention of dying intestate. I agree with you that we are not to presume crime, but, on the other hand, we are not to presume imbecility. In substance, we have Lord St. Leonards, down to the very last moment of his life, saying, "I have made all the testamentary dispositions which a careful man ought to make, which a father ought to make for his family, and I die in peace with that conviction." Are we to discard all that, and, simply upon the ground that crime is not to be presumed, to say that the will must have been destroyed by him?]

The onus of proof lies on those who set up the will.

[JESSEL, M.R. By the 20th section of the Wills Act the onus is thrown on those who seek to shew that the testator has destroyed his will with the intention of revoking it. The whole of the evidence must be taken together to see whether it raises a

(1) 2 Ad. 354.

presumption that the will was destroyed by the testator with the intention of revoking it.]

In *Brown* v. *Brown* (1) Lord Campbell said that, in the absence of rebutting facts, it was a presumptio juris that the testator had cancelled the will himself.

[COCKBURN, C.J. We are all of one mind that is impossible to come to the conclusion that Lord St. Leonards destroyed his will intending to revoke it.]

It might have been destroyed with the intention of making another, and death might have surprised him before he had carried out his intention.

Thesiger, Q.C., and *Bayford*, for brothers and sisters of Lord St. Leonards.

Davey, Q.C. (*G. Browne* and *Keogh* with him), for Mr. and Mrs. Henderson. The will ought not to be established upon the sole testimony of one of the residuary legatees. There is no other legal evidence of the contents. No declarations made by the testator after the date of his will are admissible as evidence of its contents.

[JESSEL, M.R. If they are admissible to shew that the will had not been revoked, are they not, when once admitted, evidence for all purposes?]

They are not evidence. And, further, all declarations made by the testator from the 13th of January, 1870, the day on which he executed the will, to the 20th of August, 1873, the last day on which, unquestionably, it was in existence and unrevoked, are inadmissible as evidence for any purpose whatever. In order to admit them as evidence of adherence to the will, it must first be shewn that the will was lost at the time when they were made. In *Doe* v. *Palmer* (2) there is a dictum of Lord Campbell in support of this proposition, and *Quick* v. *Quick* (3) is a direct authority on the point. *Staines* v. *Stewart* (4) is another case in point. In *Hill* v. *Wilson* (5) this Court refused to admit a claim against the estate of a dead man on the un-

(1) 8 E. & B. 876, 884, 886; 27 L. J. (Q.B.) 173. 4 Jur N.S. 163.

(2) 16 Q.B. 747; 20 L. J. (Q.B.) 367.

(3) 3 Sw. & Tr. 442; 33 L. J. (P. M. & A.) 146. 10 Jur N.S. 682

(4) 2 Sw. & Tr. 320.

(5) Law Rep. 8 Ch. 888.

1876

SUGDEN v. LORD ST. LEONARDS.

supported oath of one interested witness whose character was irreproachable.

[JAMES, L.J. On the other hand, there is the danger of a will being destroyed when there is only one person who can prove its contents.

JESSEL, M.R. If a will was purposely destroyed by an heir-at-law, it would be a very shocking result if the evidence of one person who alone had read it could not be admitted to prove the contents.]

At any rate, the decree ought to be varied by giving us costs out of the estate. The decree gives only one set of costs to the defendants.

Hawkins, Q.C., and *Inderwick, Q.C.* (Dr. *Tristram* with them), for the plaintiffs, were directed by the Court to confine their argument in the first instance to the question whether the testator's declarations were admissible as secondary evidence of the contents of the will.

No objection was raised to the admissibility of the evidence in the Court below, and being admitted for one purpose, viz. to shew that the will had not been revoked, it can be used as evidence on all the questions at issue. Evidence once legitimately introduced for one purpose may be used for the purpose of corroborating the evidence on some other fact, though it would not per se have been enough to establish that fact. For instance, under the old law, though a document could not be put in evidence merely for the purpose of proving handwriting, yet, if it could be introduced for any legitimate purpose, the jury had a right to look at it, and then they could form a judgment from a comparison of the handwriting. Then *Doe* v. *Palmer* (1) is an authority for admitting the declarations before the date of the will, and *Quick* v. *Quick* (2) is not binding on the Court of Appeal. And, in principle, what difference is there between the case where a man who is just about to execute his will writes to a friend, "My attorney is here, and I am just going to execute my will, in which I have made such a provision for A. B.," and the case where, the moment after a man has executed his will, he writes to a friend to the same

(1) 16 Q. B. 747; 20 L. J. (Q.B.) 367.

(2) 3 Sw. & Tr. 442; 33 L. J. (P. M. & A.) 146. 10 Jun 1875 682.

effect? If there is a difference, it is in favour of admitting the declaration, "I have done this," rather than that which only amounts to saying, "I intend to do it." If a testator said, years after the execution of his will, "I have provided for this or that relation," that of course would not be such strong evidence as a declaration made immediately after the execution, but a declaration made immediately, or soon afterwards, must carry much greater weight than one made several months before.

[The following cases were also referred to: *Johnson* v. *Lyford* (1); *Keen* v. *Keen* (2); *In the Goods of Sykes.* (3)]

Davey, Q.C., in reply.

Cur. adv. vult.

Cockburn, C.J.

Mar. 13. COCKBURN, C.J. This is an appeal against a decree of the President of the Probate Division, granting probate of a paper purporting to be the substance of the will of the late Lord St. Leonards. The will was last seen on the 20th of August, 1873; the death of the testator took place on the 29th of January, 1875. The will was kept in a small box placed on the floor of a room called the saloon, on the ground floor of the testator's house. Upon his death it was looked for in that box by the solicitor employed by the executors, and it could not be found. Several questions arise upon this state of facts. In the first place, was the will destroyed by the testator animo revocandi or not; secondly, can secondary evidence be given of its contents; thirdly, if so, have we satisfactory evidence of the contents; and lastly, if the evidence is satisfactory, so far as it goes, but not altogether complete, ought probate to be granted, so far as the evidence which we have before us shews what were the contents?

Now, where a will is shewn to have been in the custody of a testator, and is not found at his death, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but of course that presumption may be rebutted by the facts. Although presumptio juris, it is not presumptio de jure, and of course the presumption will be more or

(1) Law Rep. 1 P. & M. 546. (2) Law Rep. 3 P. & M. 105.
(3) Law Rep. 3 P. & M. 26.

1876

SUGDEN v. LORD ST. LEONARDS.

Cockburn, C.J.

less strong according to the character of the custody which the testator had over the will.

Now here we have to observe that the custody was anything but a close custody. The box was kept in a room on the ground floor, common not only to the inmates of the house, but to any one who had obtained access to it. It was kept in a common box, easily opened, and the key was kept in an escritoire not always under lock and key. It is in evidence, that of the different keys in the house there were no less than five by which the escritoire might be opened, and the will was, no doubt, known to the inmates of the house, or to those who had been its inmates, as being kept in this box, for, as a matter of fact, Lord St. Leonards was constantly, or, at all events, frequently, engaged in making wills or codicils, testamentary dispositions of one sort or another, and upon all these occasions some of the servants of the house were called in to witness the execution of the testamentary document, and, therefore, would well know that the box was the place for the deposit of the testamentary papers of Lord St. Leonards.

Next comes the question whether it is or is not probable that the will should have been destroyed by the testator, and here we must look at the position and character of the man. It would be difficult to find a more methodical man of business than the late Lord St. Leonards; it would be difficult to find any one who had a deeper sense of the importance of testamentary dispositions. We find that between 1867 and 1873 he made no less than two wills and eight codicils. He always exhibited the greatest possible anxiety to make a proper provision for the members of his family, and more especially for his daughter, Miss Sugden, for whom it is quite clear that he entertained the warmest and fondest affection, and who would be left wholly unprovided for in the absence of testamentary provision made in her favour. He upon all occasions expressed a deep sense of the duty, which every man ought to act upon, of making testamentary provision for those who were dependent upon him. We know, also, although, of course, we might have presumed it independently of any specific knowledge of the fact, that he was quite alive to the danger of destroying one will with the view of making another, and of the necessity of making a

will, as it were, uno flatu, to prevent the possibility of any question arising as to his intention. It must be remembered that it is in evidence that upon two occasions when he was making his will, in 1867 and 1870, there was the greatest difficulty in prevailing upon him to take refreshment, because he would not be interrupted in the work, and he gave as a reason that, if anything should happen to him while the will was, as it were, in suspense, questions might afterwards arise upon it.

Now, besides that, we have the fact that, from the time of making his will in 1870 down to the time of his death, he was in the constant habit of talking to every one with whom he came into contact, most certainly to all the inmates of the house with whom he was brought into daily contact, of the testamentary provisions he had made, expressing his satisfaction at what he had been able to do for the different members of his family, more especially for Miss Sugden, and at his having acquired, by his own professional powers and exertions, so large an amount of property. The possession of that property, the disposition of that property, and the satisfaction he felt in having made provision for the peerage which he had founded, and for the various members of his family who were dependent upon his bounty, seem to have been constant subjects of his thoughts, upon which his mind delighted to dwell, and also constant topics of his daily discourse with almost all the persons with whom he was brought into contact. It seems to me utterly impossible to suppose that, under these circumstances, such a man as Lord St. Leonards would voluntarily have destroyed this will, whether for the purpose of revoking it, or making another, or for any other purpose that could be conceived. My mind revolts from arriving at any such conclusion, and I feel bound to reject it.

Now the last time the will was seen was by Miss Sugden, on the 20th of August, 1873. Lord St. Leonards was taken ill in September, 1873, and was confined to his room from that time to Christmas, 1873, and during the whole of that time the box was kept by Miss Sugden, as she tells us, in her own room; when he again rejoined the family down stairs, she replaced the box in the saloon, that he might not miss it, and it remained there until his last illness commenced, in March, 1874. It was then again taken

1876

SUGDEN v. LORD ST. LEONARDS.

Cockburn, C.J.

possession of by Miss Sugden, and kept by her until Lord St. Leonards' death; therefore it could only have been got at by him between Christmas, 1873, and March, 1874. Long after March, when he was stricken with his last illness, and from which time he was confined to his own bed-room, he again and again referred to the various provisions he had made by the will, in other words referred to the will itself as still subsisting, and this again adds to the vast improbability of his having destroyed the will. The only conclusion I can arrive at is, not that he destroyed it, but that it was clandestinely got at by somebody and surreptitiously taken away; who that somebody is, is one of those mysteries which time may possibly solve, but which at present it would defy human ingenuity to say.

When the idea of Lord St. Leonards having himself destroyed the will is disposed of, the next question which presents itself is, whether, the will having been lost, secondary evidence can be given of its contents. Now, that matter is disposed of by the authority of *Brown* v. *Brown* (1), which, I think, has been recognised as perfectly sound. There Lord Campbell says, "Parol evidence of the contents of the lost instrument may be received as much when it is a will as if it were any other document," and in that I, for one, most entirely concur. The consequence of a contrary ruling would be in the highest degree mischievous, it would enable any person who desired, from some sinister motive, to frustrate the testamentary disposition of a dead man, by merely getting possession of the will to prevent the possibility of the will of the deceased being carried into execution. No doubt the absence of the will is a serious fact, and one which may place the Court, which has to decide whether the parol evidence of the contents is right or wrong, in a position of considerable difficulty; but with that difficulty it is the business of the Court to grapple, in order that effect may be given to the will made according to the requirements of the statute, and which after the testator's death ought to be carried into effect.

I go, then, to the third question, which is whether we have before us sufficient evidence of the contents of the will. This, undoubtedly, depends upon the evidence of Miss Sugden, and I

(1) 8 E. & B. 876; 27 L. J. (Q.B.) 173. 4 Jur. N.S. 163.

must say upon the evidence of Miss Sugden alone, to this extent, that, if we had not that evidence, all the other parol evidence in the case, and even the documentary evidence, would not enable us to say that we had ascertained the contents of the will so as to give effect to it.

[His Lordship stated the effect of the will as given by Miss Sugden, and proceeded:—]

Now this is the account which Miss Sugden gives us of this will of 1870, which she says was compounded of a will made in 1867, and additions to it in 1870. She tells us that in 1870, the testator, having in the meanwhile bought the property at Kingsdown for 41,000*l.*, and being desirous of settling that on his son Frank, made an addition to his former will, first taking off, as she says, the attestation clause, and, I presume, also the signature. It is admitted on both sides that the veracity and honesty of purpose of Miss Sugden are beyond all question, and that, whether she is strictly accurate or not in the details she has given us, she has spoken only with a desire to tell the simple truth. She may have made mistakes, and I think she must have made some mistakes, and the impression on my mind is that she has certainly fallen into some confusion between the contents of the will of 1867 and the will of 1870, or the addition made to it in 1870, for it seems to me impossible to suppose that Lord St. Leonards would have omitted in the will of 1867, which, as is represented by Miss Sugden, comes down to the appointment of executors, a disposition of his residuary estate. I think it is impossible, also, that the legacies to the different members of his family should not have been thought of and provided for by him in his first will of 1867. There is a long series of legacies given to various members of his family, none of which are mentioned in his first will of 1867. I cannot think that he would have omitted any mention whatever of so many daughters and their children, all of whom are mentioned, and have legacies left to them, in the will of 1870. But I am bound to say that I attach very little importance to any confusion upon this head into which Miss Sugden may have fallen. No matter whether the dispositions to which I have last adverted, including what is the most material, namely, the residuary clauses, were in the first will, or were in the additions, so as to constitute

1876

SUGDEN v. LORD ST. LEONARDS.

Cockburn, C.J.

the second; if we have obtained the substance of the will of 1870, although the particular dispositions may not occur in the precise order stated by Miss Sugden, if we have got the substance, in my opinion that is abundantly sufficient.

Now we have to ask ourselves how far, Miss Sugden's veracity and honesty of purpose not being for a single moment questioned, we can place implicit reliance upon that lady's recollection of the various testamentary dispositions contained in the will upon which she has spoken. No doubt the observation naturally presents itself that in a matter of this kind, with details more or less of a technical character, it is not likely that these things should have impressed themselves upon a lady's mind, or that she should be able to produce them with anything like satisfactory accuracy. But then I think, as the learned President of the Probate Division has pointed out in his luminous judgment, we must look at the peculiar position of Miss Sugden, and the peculiar training which she had undergone. She lived with, and devoted her life to a great lawyer, who may be said, literally, to have lived in the law, who seems to have devoted his whole life, even to the last, to the study of the law and to the production of those works which are so highly valued by the profession. Then he was in the habit of employing Miss Sugden as his amanuensis, and when he was preparing the various editions of his works, he employed her to correct the proofs; he was fond of explaining to her the various points of law, as they from time to time presented themselves, in going through his works, and explaining to her things which otherwise, no doubt, she would not have been able to understand. Now, besides that, she had on various occasions, an opportunity of reading these two wills of 1867 and 1870; upon each occasion when Lord St. Leonards had completed his will he read it over to her, and she had other opportunities of seeing the will, and she tells us that she read it over three times; besides being called upon by him, on different occasions, when he was making a codicil, to refer to the will for the particulars which he wanted. That, of course, places her in a very different position from what would have been the case with a lady otherwise circumstanced; her story, therefore, I am prepared to believe, that, with all these advantages, she had become familiar with the testamentary dispositions made

in these wills by her father. It is true, when we look at the will as propounded, at the paper purporting to contain the provisions of the will as propounded, the language may be found to assume a technical character, of which it would be little likely that, even with all her opportunities and advantages, Miss Sugden should have acquired the command. But then, the answer to that is given, I think, by Sir James Hannen, namely, that her statement is not clothed in that technical and professional form, but is the simple statement of a layman, of what the provisions in the will were.

It is, nevertheless, open to observation, that Miss Sugden is a very interested person, that she takes very large benefits under this will. I am glad to think that it has not occurred to anyone to say, or to suggest, that upon that ground Miss Sugden has intentionally departed one hair's breadth from the truth. Nevertheless, a deep interest in the details of a will may lead a person, under the bias which interest so naturally produces, to fancy she recollects something in her own favour which she may not really recollect; therefore, although I am perfectly ready to give implicit credence to everything which Miss Sugden has stated as to the contents of this will, I should be glad to find, for my own satisfaction, and the satisfaction of every one else, corroboration of her statements in the collateral evidence. Those statements, it will be observed, have reference partly to the real property left by Lord St. Leonards and partly to the personalty. Now let us see what confirmation there is of her representation as to the dispositions of the will relating to the real property; and that confirmation is to be found, practically, if not entirely, in the codicils made by Lord St. Leonards, between the execution of the will in 1870 and August 1873, when the last codicil was made. These codicils refer, again and again, to the dispositions of the real estate made by the will; and it has been pointed out in the elaborate and most able judgment of Sir James Hannen how the various statements of Miss Sugden as to the particular provisions of the devises of the real estate are confirmed by references to them in the codicils. It would require some time to go over the whole of the ground, and to point out how codicil after codicil confirms and supports her statement with regard to the disposition of estate after estate. This, however, has been done so fully and, to my mind, so conclu-

1876

SUGDEN v. LORD ST. LEONARDS.

Cockburn, C.J.

sively, in the elaborate judgment of Sir James Hannen, that it is only necessary to refer to that judgment for the conclusion I have arrived at, namely, that the codicils afford abundant confirmation of her statements with regard to the real estate.

I come then to the personalty, as to which the codicils do not help us, and where, therefore, if Miss Sugden's statement required confirmation, it would be necessary to look for it elsewhere. And here I may say, once for all, that, in my opinion, if there were not one tittle of confirmatory evidence as regards this or the other part of the will, I am so satisfied of the perfect truthfulness, substantially speaking, of the statement of Miss Sugden (I think she may have fallen into confusion upon some matters, and there may have been some omissions from her statement) that I only enter into this part of the evidence because it is satisfactory to find statements which involve such vast interests to the parties concerned corroborated by extrinsic independent proof. Now, this corroboration is to be found more immediately in the testamentary papers and statements, and verbal declarations of Lord St. Leonards himself. And here the question arises as to the admissibility of these declarations; and although, as I just said, I look upon this part of the evidence as the least important, because I am perfectly satisfied without it as to the conclusion at which I arrive, still the question of the admissibility of the evidence is one of considerable importance in a legal point of view, and, as I am clear upon it in my own mind, I think it had better be disposed of. The question is whether the declarations of the testator can be received as secondary evidence of the contents of the lost will. No doubt, generally speaking, where secondary evidence is admissible, if oral, it must be given on oath; if documentary, it must be verified on oath. Nevertheless, the declarations of deceased persons are in several instances admitted as exceptions to the general rule; where such persons have had peculiar means of knowledge and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare

instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree, evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case.

It is upon this principle, I presume, that the declarations of a deceased testator have in more than one instance been admitted as evidence. Thus, they have been admitted, as in *Doe* v. *Palmer* (1), to negative the presumption arising from interlineations appearing on the face of a will, that such interlineations have been made subsequently to the execution of the will. In like manner the declarations of a testator have been admitted to shew the continuing existence of the will at the time they were made, and so to rebut the presumption of the will having been destroyed animo revocandi, when the will, having remained in the custody of the testator, is no longer forthcoming. Thus, if a testator were to say, "When I am dead you will find my will in such a place;" or, "I have left my estate of Blackacre to my son John;" or, "I have left 5000*l.* to my daughter Mary;" such, or similar declarations, would be receivable in evidence to shew that the will was, so far as was known to the testator, in existence at the time they were made.

2 P.D. 63

The question before us is whether the statements made by a testator as to the provisions of his will can be received as evidence of the contents of a will known to have existed, but which at his death is no longer forthcoming. That, morally, such statements and declarations are entitled, where no doubt exists of their sincerity, to the greatest weight, cannot be denied; and I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will. If the exception to the general rule of law which excludes hearsay evidence is admitted, on account of the exceptional position of a testator, for one purpose, why should it not be for another, where there is an equal degree of knowledge, and an equal absence of motive to speak

(1) 16 Q. B. 747; 20 L. J. (Q.B.) 367.

1876

SUGDEN v. LORD ST. LEONARDS.

Cockburn, C.J.

untruly? Could it be contended that, if the testator had given written instructions for his will, or had first made a draft of the will, and had endorsed on the back of it, "This is the draft from which I copied my will," the draft would not have been admissible to prove the contents of the will? Or suppose he had made a copy of the will, indorsing it as such, is our law this that the copy would be inadmissible to shew the contents of the will if it was lost?

All the observations made by Lord Campbell in *Doe* v. *Palmer* (1) as to the mischief which would result from excluding such testimony apply equally here. "If the draft of the will could be produced," says Lord Campbell, "corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it that, before the will was executed, the draft and the will had been compared and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ, for this purpose, from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? What distinction can be drawn between the draft of the will, or the written instructions for the will, and the verbal declaration of the testator's intention, except as to the strength of the evidence which they respectively afford? As to admissibility, they all seem to rest on the same principle; and, if the verbal declaration of intention must be rejected, so must the draft of the will with the initials of the testator affixed to it. It would not be very creditable to the law if such evidence were to be excluded; and I am not aware," he adds, "of any principle, rule of law, decided case, or dictum against the admissibility of such evidence." These observations, in which I entirely concur, appear to me equally applicable to the present case. I entertain no doubt that prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though, of course, not conclusive evidence, are yet legally admissible as secondary evidence of the contents of a lost will. There are no doubt cases in

(1) 16 Q. B. 747; 20 L. J. (Q.B.) 367.

which the declarations of a testator are inadmissible. Thus a statement by a testator that he had duly executed his will could not be received as evidence of its due execution, as was decided in *The Goods of Ripley* (1); and there is good reason for the decision, namely, that the exercise of the testamentary power, being conditional on the observance of the formalities prescribed by statute, a man cannot, by his own mere assertion, establish that he has fulfilled the conditions necessary to the exercise of the right. So, where there is a patent ambiguity on the face of a will, arising from an error either in the designation of the person who is to take, or of the property bequeathed, which makes the carrying of the will into effect impossible, the instructions or other declarations of the testator cannot be resorted to to remove the difficulty. For here again the statute comes in the way, and prevents effect being given to the will otherwise than as executed by the testator. So that if, as in *Doe* v. *Hiscocks* (2), he has spoken of John as the eldest son of his son John, when in fact the eldest son of John was Simon, and John was the second son, effect cannot be given to the will by shewing that the testator meant Simon when he said John. That would be to make a new will unaccompanied by the statutory requirements. It is obvious that the present case stands on totally different grounds. Like that of *Doe* v. *Palmer* (3), it has no reference to an ambiguity to be solved. No difficulty here arises as to making the will speak differently from its language as executed by the testator. There being no question as to the due execution, the statute creates no difficulty. The question is simply one of the admissibility of secondary evidence, and has to be determined by the rules of evidence alone. I am therefore decidedly of opinion that all statements or declarations, written or oral, made by a testator prior to the execution of his will, are admissible as evidence of its contents; and this of course lets in, in this case, the papers "J." and "K.," memoranda made by the testator as preparation for his will.

The admissibility of declarations made subsequently to the execution of the will creates greater difficulty by reason of a dictum of Lord Campbell in *Doe* v. *Palmer* (3), and a decision of Lord

(1) 1 Sw. & Tr. 68. 4 Jur N.S. 842 (2) 5 M. & W. 363.
(3) 16 Q.B. 747; 20 L. J. (Q.B.) 367.

1876

SUGDEN v. LORD ST. LEONARDS.

Cockburn, C.J.

Penzance in *Quick* v. *Quick*. (1) In principle there appears to me to be no distinction. The position of the testator is the same, as respects both peculiar knowledge and motive for speaking the truth, which can be no less than the motive which he has when making statements as to his intentions prior to the execution of the will. In the case of a holograph will, the testator alone may know the contents. In the case of its loss, his statements afford, morally, the best evidence of the contents; yet we are asked to exclude their operation as shewing the contents, though it is acknowledged that such evidence is available to rebut the presumption of revocation, and to establish what is called adherence to the will. The adoption of such a rule would, moreover, lead to a very strange anomaly. The great majority of statements made by a testator, adduced for the purpose of proving adherence, are in fact statements as to the contents of the will. But such statements of the contents of the will, assumed to be truthful, having been admitted and acted upon for the purpose of shewing that, so far as the testator was concerned, the will was still alive, how is it possible to shut out that evidence when the contents come directly in question? It appears to me that if, as an exception to the general rule, the evidence is admissible for the one purpose, it must be equally so for the other. How can we use evidence of the contents of a will for an ulterior purpose, and shut out the same evidence when the contents of the will are themselves immediately in question?

As regards the two authorities referred to, it is to be observed that what was said by Lord Campbell in *Doe* v. *Palmer* (2) is merely an obiter dictum, unnecessary to the decision of the case, inasmuch as all the declarations of the testator given in evidence there had been made prior to the execution of the will. Lord Campbell says, "Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires," a proposition in which, for the reasons I have already given, I fully concur. He then goes on to say, "And, for the same reason, a declaration by the testator after the will was executed, that the alteration had been made previously, would be inadmissible." This may be more doubtful. But assuming it to

(1) 3 Sw. & Tr. 442; 33 L. J. (P. M. & A.) 146. 10 Jur. N.S. 682
(2) 16 Q. B. 747; 20 L. J. (Q.B.) 367.

be right, it does not touch the present case. The question in *Doe* v. *Palmer* (1) turned on the efficacy or inefficacy of the execution, which, if made after the interlineations, would be valid, but if made before they were inserted, would be inoperative to cover them. What it comes to is, that the declarations of a testator cannot be used to prove that the execution of the will was such as to give effect to it. The dictum of Lord Campbell does not really, any more than the decision in the case, affect the question of the admissibility of the declarations of a testator as to the contents of his will where the execution is not in question.

The case of *Quick* v. *Quick* (2) is, however, an authority directly in point, as the contents of the will were there sought to be proved by declarations of the testator made after its execution. Refusing to act on these declarations, Lord Penzance refused probate of the will. Taking a different view of the law, for the reasons I have given, I cannot concur in the judgment of Lord Penzance in the case of *Quick* v. *Quick* (2), and I feel that we are bound to overrule it.

I am, therefore, of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his will, are admissible to prove its contents. This being so, the statements of Miss Sugden receive abundant confirmation. The paper in the handwriting of Lord St. Leonards, marked "J.," sets forth the legacies he was about to make, substantially as Miss Sugden has represented them as occurring in the will, with one or two trifling errors easily corrected. The emphatic statement made by the testator to Mr. Frank Sugden that he intended to do more for those of his daughters who had given him the least trouble and shewn him the most affection, and his reiterated statements to every one about him as to what he had done for Miss Sugden, and that she would not only be a landed proprietor but would be wealthy, and would enjoy the same comforts and style of living which she had enjoyed when living with him, a result which certainly would not have followed from the provisions made for her in the first will, suffice to confirm her statement that the residue of the personal estate was left to her and two of her sisters to the exclusion of the other daughters.

(1) 16 Q. B. 747; 20 L. J. (Q.B.) 367.
(2) 3 Sw. & Tr. 442; 33 L. J. (P. M. & A.) 146. 10 Jun 1882

1876

SUGDEN v. LORD ST. LEONARDS.

Cockburn, C.J.

I am, therefore, of opinion that if the statement of Miss Sugden needed confirmation—which I think it does not—the codicils, the testamentary papers, and the parol evidence of the declarations of Lord St. Leonards abundantly confirm it.

As regards the only remaining question, namely, whether, assuming that we have not before us all the contents of the lost will, probate should be allowed of that which we have, so long as we are satisfied that we have the substantial parts of the will made out, I cannot bring myself to entertain a doubt. If part of a will were accidentally burnt, or if a portion of it were torn out designedly by a wrongdoer, it would nevertheless, in my opinion, be the duty of a Court of Probate to give effect to the will of the testator as far as it could be ascertained. It is not because some, who would otherwise have benefited by the will, may thus fail to profit by the intended dispositions of the testator, that his will should be frustrated and fail of effect where his intentions remain clearly manifest. It may be that in this will there were matters which Miss Sugden fails to remember—and I cannot but think that there must have been ultimate remainders which Miss Sugden no longer remembers—indeed, she has herself said that there were other remainders that she does not recollect. So far, therefore, we have the contents of the will before us in a defective form. It may also be that there are some few legacies—there cannot be many—which she does not recollect. They must be few, and they cannot have been of any material consequence. But we have the substantial testamentary dispositions brought to our minds, and it would not be right to enable any wrongdoer or any accident—not putting it so high as an intentional wrong—which might happen to a will, and which would prevent the Court which had to deal with it from being perfect master of its contents, to prevent the will from being carried into effect so far as the dispositions of the testator had become known. I think there could not be a more mischievous consequence; and although it may be unfortunate that the will cannot be carried into execution to the full extent of the testamentary dispositions of the testator, I think that of two evils or two inconveniences it is far better, where the Court can see its way to the essentially substantial dispositions made in a will, that it should give effect to them, although possibly

some of the intentions of the testator may not be carried into effect.

For these reasons I am of opinion that the decree of the President of the Probate Division, granting probate of the paper propounded as containing the provisions of the will of the late Lord St. Leonards, was right and should be affirmed.

I am further of opinion that, after the elaborate and luminous judgment of Sir James Hannen, the parties ought to have been satisfied, and this appeal should not have been brought, and that consequently it should be dismissed with costs.

Jessel, M.R.

JESSEL, M.R. If this were an ordinary case I should content myself with saying that I concur in the judgment which my Lord has just pronounced. But it is not an ordinary case; it involves legal considerations of great importance, although of great rarity, and I therefore think it right to pronounce a judgment of my own.

The points brought before us I will deal with in the following order: I will first consider the question of the revocation of the will. Now, as to that, no doubt, the law requires that it should be proved satisfactorily that a will has been duly executed and attested. You must also prove destruction of the will with intent to revoke, in order to get rid of the will itself. But there is another rule of law equally well established—that you do produce satisfactory proof of that which the legislature requires, if you trace the will to the possession of the testator, and it is not forthcoming at his decease, and there is no evidence to shew what has become of it. That raises a sufficient presumption of law that he destroyed it with the intention of revocation; but like all other presumptions of law, it may be rebutted by sufficient evidence. I believe I am right in saying that, like all other presumptions of law, it may be rebutted by what is commonly called parol, but in this case might, more strictly perhaps, be called oral evidence. To determine the first question, therefore, we have only to consider whether there is sufficient evidence to rebut the presumption.

Now, after the elaborate judgment delivered by the learned President in the Court below, and by the Lord Chief Justice in

1876

SUGDEN v. LORD ST. LEONARDS.

Jessel, M.R.

this Court, I shall not recapitulate the details of the evidence; but I must say I am satisfied that the testator in this case died under the belief that he had left behind him a will disposing, in a manner satisfactory to him, of his whole estate. Every act of his life which is proved, every statement made by him which is proved, in respect of his testamentary dispositions, to my mind point to but one conclusion, and to arrive at a contrary conclusion would be to believe that Lord St. Leonards not only spoke a lie but acted a lie to the last moment of his existence. I think in this case the presumption of revocation is completely rebutted, not only by the evidence of Miss Sugden herself, but by all the other evidence which is directed to that portion of the contest.

The next point which we have to consider is one of a very serious character. It is said, and truly said, that, however great may be the reliance to be placed upon the testimony adduced as to the contents of this will, there is no evidence of the whole of the contents of it; and, further, there is evidence that a portion of the contents is not now known. Upon that there can be no doubt or question, because the principal witness—in fact for certain purposes the only witness in support of the instrument—Miss Sugden, herself tells us, first, as regards the personalty, that there were some small legacies the particulars of which she is unable to recollect; and, secondly, as regards a considerable portion, in fact the larger portion, of the real estate, that there were some limitations over after the seven life estates, besides the estates limited to the issue of the tenants for life, the particulars of which she does not remember, although she does remember that other estates were left amongst the members of the family. Therefore, we have, in the one case, legacies, no doubt, of comparatively small amount, trifling in themselves, the particulars of which we are unable to discover; in the other case we have limitations, remote, indeed, and unlikely to come into effect, but still which are undoubtedly omitted from the document of which probate has been granted, and the question which we have to decide is, whether under such circumstances as these we can admit the will to probate at all?

Now I will consider the argument, first, as affecting the personal estate; and, secondly, as affecting the real estate. The argument

as to the personal estate was this:—It was said, if it is proved to your satisfaction that legacies are omitted, then, by granting probate of the will which disposes of the residue, you are giving a larger proportion of the personal estate to the residuary legatees than was intended for them by the testator, and in so granting probate you are not only not performing the intention, but you are acting contrary to the intention, of the testator. This argument appears to me to be fallacious—it turns on the use made of the word "intention." It seems to me that the testator may be said to have in this respect two intentions—he has a primary intention that the legatee, whether general or specific, shall take the legacy—he has a secondary intention that, if by any reason whatever that legacy cannot take effect, then it is to go, not to his next of kin, but to his residuary legatees. It may well be that we are not able to give effect to the primary intention, but we certainly are able to give effect to the secondary intention; and I see no reason why we should not give effect to the secondary intention because the circumstances which have happened have made it impossible to carry out the primary one to the extent of the legacies, the amount of which, and the names of the legatees of which, we do not know. This is by no means a new version of the law. We are familiar with the law as to personal estate as it existed before the last Wills Act, which has been extended by that Act to devises of real estate—I mean the rule that lapsed or void bequests fall into the residue. Now, the rule which was established by the judges before the legislature confirmed it by the Wills Act meant this—not that the testator whose whole property was, say 11,000*l.*, and who gave 10,000*l.* to his son, and the residue to his nephew, not contemplating that the son would die in his lifetime, intended the 11,000*l.* for the nephew, because everybody knows that a testator, in the absence of express provision to the contrary, contemplates the survival of his legatee; but it meant this: that he intended that particular nephew to take what was left of the personal estate under whatever circumstances the residue might be increased. In the case of lapsed bequests the intention was entirely defeated; in the case of void bequests —say that the testator being possessed of 11,000*l.* consisting wholly of mixed personalty, gives 10,000*l.* to a charity and the

1876

SUGDEN v. LORD ST. LEONARDS.

Jessel, M.R.

residue to A.B., a stranger—it might well have been said he would not have preferred that stranger to his next of kin, had it not been that he died in the belief that the bulk of his fortune would be devoted to charity, and to say that that which the charity cannot take shall go to augment the residue in favour of the residuary legatee, a stranger, is entirely contrary to the intention which might naturally be imputed to the testator. But the law is clear upon the subject, that, the primary intention not being capable of being carried out, because the charity cannot take, the residuary legatee takes the fund, although it was certainly not the primary intention of the testator. The same principle was extended to the case where it was uncertain who the legatee was. The uncertainty might arise in various ways—the handwriting of the testator (and this has happened in holograph wills) might be so bad that it was impossible to read the name of the legatee, and there was no other description by which to identify it—in that case the intention of the testator was certainly to benefit the legatee to the extent to which he was mentioned, yet, in the uncertainty as to his name, the sum given to him fell into and augmented the residue. Or the uncertainty might arise from other causes; the legatee might be so imperfectly described that it was impossible to ascertain who he was; there might be two or more persons answering the description and no evidence to distinguish between them. In that case the law did not divide the legacy between these two or more persons, but again held that the legacy failed, and that the amount fell into the residue.

Now what difference is there in principle between the cases I have mentioned and the cases which have been alluded to by the Lord Chief Justice? Take the case of a candle falling on the will and obliterating the name of the legatee; why should there be more difficulty in the Court granting probate with the name omitted by reason of a candle, or a chemical liquid, having fallen upon it after the death of the testator, than by reason of the illegibility of his handwriting, or of the uncertainty from the description of the will who the legatee was? There is no difference as to the intention; in all the cases there is a primary intention which is defeated, and a secondary intention to which effect is given. It appears to me there is no difference at all in principle.

But is there any difference where the loss of legacies arises, not from actual obliteration upon the face of the will itself, but from obliteration from the tablets of the memory, so to speak, of the witness whose testimony is admitted as secondary evidence of the contents of the will? It seems to me that in principle it can make no difference whatever, and, therefore, that there is no objection upon this ground in granting probate as regards the personal estate. Lastly, it appears to me that there are numerous decisions in the old ecclesiastical courts, which would be followed in the present Court of Probate, confirming this view—I mean those cases, many of which are reported, in which probate has been granted of a will, although it was proved that one or more codicils had existed also. In other words probate has been granted of part of the whole testamentary instrument, because the will and codicils together make the testamentary instrument, and it does not matter for this purpose whether it is a portion of the will or a portion of the codicil which is lost. I may mention that there are also decisions by which probate has been granted of a codicil or codicils although the will itself was lost. Therefore, those decisions shew, that the mere fact of its being known that a portion of the testamentary instrument is wanting is not sufficient to prevent the Court from granting probate of that which is left, it being satisfied that what is left is substantially correct so far as it goes. I think this disposes of the argument as to intention as regards the personal estate.

As regards the real estate, the matter stands upon a somewhat different footing; as to that we have, assuming that the evidence is to be relied upon, limitations of the real estate, which are perfect, so far as they go. As regards what have been called the principal estates, which are, in a sense, attached to the peerage, all Miss Sugden says is that there were limitations after those she has mentioned amongst the testator's family, but as there were seven life estates, followed by limitations in tail, it seemed so absurd to think of the ultimate remainders that she says, "I never thought much about it." So that what is missing is something which, if it existed, and could be proved, would damage the heir-at-law to the extent to which these subsequent limitations could take effect, but the omitting them from the probate cannot, as I have said

1876

SUGDEN v. LORD ST. LEONARDS.

Jessel, M.R.

before, injure him, but must benefit him. It does not seem to me, therefore, that he can have any ground of complaint at there not being any residuary devises as regards these estates.

As regards the other properties which are given over on failure of the prior limitations, if we were at liberty to conjecture, we might say it was strange that the whole of the properties were not to accompany the peerage, but upon this point Miss Sugden's evidence is positive, and she has not been further questioned about it. She says, as to Kingsdown, Boyle Farm, and Peasemore, that they were left in the manner she mentions on failure of the prior limitations, and that the limitations which she does not remember had reference only to the other estates. Therefore, in the present state of the evidence, there is no gap to be filled up, as regards any of the estates, except those which were primarily to accompany the peerage.

But it was said that we ought not to grant probate as to the real estate by reason of the change which has taken place in the law of probate since the passing of the Probate Act. I by no means accede to that argument. The Probate Act did not really change the law on the subject; it only enabled a tribunal created by that Act to grant probate of wills of real estate, and it did nothing more. The 62nd section of the Act says that where a will is proved in solemn form, or its validity otherwise decided upon, the decree of the Court is to be binding upon the persons interested in the real estate, and then the 63rd section says, that unless the heir is cited he is not to be bound. Now, what is the effect of that? No doubt it enabled the Court of Probate, and of course it enables the High Court of Justice now, as the successor of that jurisdiction, to bind the heir by proving the will in solemn form, but that was not new; the Court of Chancery always did bind the heir by establishing a will in a suit properly instituted. It no doubt established it, after a trial in solemn form, which was called an issue devisavit vel non, but which was as much an issue of the probate of real estate against the heir as the probate granted by the Probate Court when the will is proved in solemn form and the heir cited. The act did not make an alteration of the law, it only empowered another tribunal by a similar, and nearly identical, procedure, to establish a

will against the heir at the same time that it established a will against the next of kin, and that was all. And, indeed, so clear is that, that the Court of Chancery, so long as it existed, retained its ancient jurisdiction of establishing a will against the heir, and, in cases where the will related only to real estate, you must have had recourse to the Court of Chancery, as you must now have recourse to the Chancery Division of the High Court, which has inherited, so to speak, the jurisdiction of the Court of Chancery. In fact, as all real property lawyers know, in ancient times it was customary for great landed proprietors to make, not only separate wills of real and personal estate, but several wills of real estate. I have seen as many as three ancient wills of different portions of the real estate of the testator, devoting an estate to different purposes. One might devote a portion of the real estate to a charity—that would be a separate will—another might give an estate to one devisee, and a third might give another estate to another devisee. If the testator intended to found two families, he was often desirous that his will should accompany the muniments of title to his estate, and, therefore, he made separate wills. If a testator made a separate will of personal estate, then you could not, even under the Probate Act, have gone to the Court of Probate, but you must still have had recourse to the Court of Chancery, to establish the will as regards the real estate. It appears to me, therefore, that the Probate Act has no bearing whatever on the question we have to decide, and, if it would have been right before that Act to establish a will in the Court of Chancery, it would be equally right after it to grant probate of the will as to the real estate. Now, it was not contested that before the Probate Act you could have proved a devise to a plaintiff, who claimed an estate in ejectment, independently of the other devises in the will. He had nothing whatever to do with the other devises. If he claimed a gift of Blackacre in fee by the will, and brought ejectment, all he had to prove was a good will of Blackacre, or if he claimed as tenant for life only, all he had to prove was that there was a good gift of Blackacre to him for life, and it was immaterial, so far as he was concerned, that the rest of the will had been eaten by rats, as happened in one case, or destroyed by fire, as happened in another, or torn up by a person who thought himself injured by it, as happened in

1876

SUGDEN v. LORD ST. LEONARDS.

Jessel, M.R.

another reported case, because he had discharged himself as regards the proof, when he had shewn that the will, as regarded the property he claimed, was a valid testamentary instrument. If that is once admitted, it appears to me we ought to have no difficulty in establishing a will to the extent to which it is proved by evidence, leaving the ultimate limitations to be established if the real will should ever be discovered, and this is the form of probate which has been granted in the present case. Therefore, in this respect, I think the decree appealed from ought to stand, although it is quite true there are some limitations, the exact terms of which we are unable to discover. That disposes of the second point.

The third point is also one of great importance. Can we admit, as a matter of course, secondary evidence in proof of a will? I should have thought that there could be but one answer to that question; and had it not been for the doubt thrown out by a very eminent judge, in the case of *Wharram* v. *Wharram* (1), I should have thought it impossible to argue the question. The object of secondary evidence is to supply the loss of primary evidence by accident or otherwise. It was felt, at a very early period of the establishment of courts of equity, that it was a great grievance that by the then rules of procedure of the common law a plaintiff could not recover on a lost deed; it was not a rule of the common law, but a rule of the procedure of the common law, which required him to make proof of it in his plea. But where the deed had been lost the court of equity interfered, and allowed the plaintiff to produce secondary evidence of it. He was allowed to prove, by other evidence than the deed itself, the existence and the execution of the deed, and its contents. After a time the courts of common law altered their procedure—as I said before, not the law, but the procedure—to enable the plaintiff in a common law action to obtain the same advantages as he could previously have obtained only in equity. But the whole theory of secondary evidence depends upon this, that the primary evidence is lost, and that it is against justice that the accident of the loss should deprive a man of the rights to which he would otherwise be entitled. I am at a loss to discover any reason whatever for distinguishing between the loss of a will and the loss of a deed. If it is said that

(1) 3 Sw. & Tr. 301; 33 L. J. (P. M. & A.) 75. 10 Jur NS. 49

a will requires execution and attestation, a deed requires execution and delivery, and you could not establish a deed until you had shewn that it had been executed, that is, sealed, and delivered. These were the peculiar formalities as regarded a deed. As regards some deeds, such as deeds in exercise of powers, attestation was commonly required, and as regards those deeds everything that would be required in the case of a will may be proved by secondary evidence. You must prove, then, not only execution, but that the deed of appointment was duly attested. Therefore, on principle, there is, as it seems to me, no possible distinction to be suggested between the proof of a deed and the proof of a will. Besides this, there was a long course of undisputed authorities all pointing in the same direction. No one had doubted, until the case of *Wharram* v. *Wharram* (1), that you could prove a will by secondary evidence, but a doubt was then suggested whether that could be allowed after the passing of the new Wills Act. It seems to me, however, that this is not a question of the requirements of the Act, because there was nothing new in the Act in respect of the execution of wills of real estate, except that the legislative requirements were diminished. The Statute of Frauds not only required signature, but required the attestation of three witnesses to pass real estates by will. By the new Statute of Wills that was reduced to two witnesses, and there was no other difference, except in the case of the signature, between the requirements of the Statute of Frauds and the requirements of the new Wills Act. Therefore, if you could have proved a will by secondary evidence before that Act, there is no reason, that I can see, why you should not be able to prove it in the same way after.

As regards personal estate no doubt there was a difference, because before the statute if a will had not been in writing or signed, there was the possibility of saying that that which is called evidence of the will was the will itself; but even that was not quite accurate, because our law required the best evidence, and when the will was in writing, and was not produced, it was not proved unless secondary evidence was let in. Therefore, in that case also the decisions which let in secondary evidence went to prove that you could have secondary evidence of a will.

(1) 3 Sw. & Tr. 301; 33 L. J. (P. M. & A.) 75. 10 Jur N S 699.

1876

SUGDEN v. LORD ST. LEONARDS.

Jessel, M.R.

It appears to me therefore clear, both on principle and authority, not forgetting especially the case of *Brown* v. *Brown* (1), which the Lord Chief Justice mentioned, that secondary evidence can be admitted to prove the contents of a lost will.

The next point, and one no doubt also of great importance, is what secondary evidence is admissible. In this particular instance there is the evidence of a person who had seen the will, and the real point to be considered and decided is whether that evidence can be confirmed or corroborated by declarations of the testator made, either to that witness or to other persons, and if so, whether those declarations to be admissible in evidence must be limited to declarations made at or before the execution of the will, or may be extended to declarations made after the execution of the will.

Now, it might well have been that our law, like the law of some other countries, should have admitted as evidence the declarations of persons who are dead in all cases where they were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, whether in writing or oral, made by deceased persons, are not admissible in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule.

I will consider, first, what the exceptions are, and what is the principle which guides the Court in making exceptions. The exceptions are generally considered to be three principal and three subordinate exceptions. It does not matter in what order I take them. First, there is an exception of a declaration accompanying an act; secondly, of a declaration against interest; and, thirdly, of a declaration made by a person in the course of business, one which it was his duty to make. Those are three large exceptions.

There are then some smaller exceptions; the first is the proof

(1) 8 E. & B. 876; 27 L. J. (Q.B.) 173. 4 Jur N.S. 163.

of matters of public and general interest, one might say of quasi historical interest, not actually historical, where we admit the declarations of persons who may from their position be fairly presumed to have had knowledge on the subject.

In the next place, we admit evidence which is in its nature very weak indeed, that is in matters of pedigree, where we admit declarations of deceased members of a family, on its being shewn that the persons were members of the family.

Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases.

Now, all these reasons exist in testifying both as to matters of public and general interest, and as to matters of pedigree, and some, if not all of them, exist in the other cases to which I have referred. They all exist in the case of a testator declaring the contents of his will. Of course, as in the case of pedigree, the Courts must be cautious in admitting such evidence. From its very nature it is evidence not open to the test of cross-examination, it is very often produced at second or third hand, and it is therefore particularly liable to lose something of its colour in the course of transmission. It is so easily and so frequently fabricated that all Courts which have to dispose of such cases must be especially on their guard.

But that goes only to the question of the weight to be attributed to the evidence when admitted, it does not go to the question of admitting the evidence itself; and I must say it appears to me that, having regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases to which I have referred, we should be equally justified

1876

SUGDEN v. LORD ST. LEONARDS.

Jessel, M.R.

and equally bound to admit it in this case. When I say equally, perhaps I state the case a little too low, because if there is any case in the world in which it is incumbent upon a tribunal not to grant a premium for fraud or wrong; not to hold out to the world that any man who is able to get hold of the will of a testator which may disappoint him of his expectations, just or unjust, if he once destroys it, shall be able to acquire the property either for himself or for those whom he wishes to benefit,—I say if ever there was such a case it is the case of a lost will. The Court should be anxious, not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but, guided by those great principles which have guided other tribunals in other countries in admitting this kind of evidence generally, to admit it at all events in the special case which we have under consideration.

I, therefore, entirely concur in the Lord Chief Justice's conclusion that this evidence is admissible, not only as regards that portion of it which is anterior to the execution of the will, but also as regards that portion of it which is posterior to its execution. As regards the portion of it anterior to the execution, it has been admitted, where it has been admitted at all, on a somewhat different ground. It is not strictly evidence of the contents of the instrument, it is simply evidence of the intention of the person who afterwards executes the instrument. It is simply evidence of probability—no doubt of a high degree of probability in some cases, and of a low degree of probability in others. The cogency of the evidence depends very much on the nearness in point of time of the declaration of intention to the period of the execution of the instrument. Now, in this case we have that link supplied in the most satisfactory manner as regards the two important documents "J." and "K." We have the evidence of the witness that they were, to use her words, jotted down at the time when the will was being written, and therefore immediately before the execution, and in that case it is not to be presumed for a moment that there was any change in the intention of the testator from the time of jotting down his legacies to the time when he signed the will. As regards the earlier document, no doubt that relates to a prior will, the will of 1867, but we have the evidence of Miss

Sugden that that will was incorporated with the second will, and therefore to that extent it brings the evidence down to the time of the execution of the second will.

We must also remember that these documents were carefully preserved by the testator; that they were tied up with other documents in the same box which contained his will and codicils, and that it is not likely he would so carefully have preserved them if he had changed his intention between making them and signing his will. If they had no longer represented his final intention he would probably have destroyed them or thrown them away as waste paper. That confirms, to my mind, the value of the documents—that although only evidence of intention, yet they are evidence of intention not changed at the time of the execution. Upon these documents, I think, whatever view may be taken as regards the latter one, full reliance ought to be placed.

Then I come to the question whether, irrespective of the post-testamentary declarations, as I may call them, there would be any ground for saying that there was not sufficient evidence to sustain the proof of this will. I am clearly of opinion there is no such ground. It happens fortunately in this case that these post-testamentary declarations are of comparatively little value. In the only instance in which confirmation is required they are very vague and general. That instance is the share of the residue given to Miss Sugden.

Now, in considering the last point as to the sufficiency of the evidence, I will take the case first irrespective of these post-testamentary declarations which the learned judge in the Court below felt himself bound, as I think he was bound, by the decision in *Quick* v. *Quick* (1) to disregard, and I must say I should entirely concur with the learned judge in his conclusion, even assuming that I was bound, as he was, by the decision in *Quick* v. *Quick* (1), to disregard that evidence. But how does the matter stand? The will was read frequently, and under peculiar circumstances of interest, by Miss Sugden. She had not only an opportunity of becoming familiar with its contents, but she had the strongest motive for doing so. The will concerned not only herself, but

(1) 3 Sw. & Tr. 442; 33 L. J. (P. M, & A.) 146. 10 Jur N.S. 682

1876

SUGDEN v. LORD ST. LEONARDS.

Jessel, M.R.

those who were nearest and dearest to her. It would be no idle curiosity which would induce her to read it and re-read it with attention, and to remember its contents with accuracy and fidelity.

Therefore we have the evidence of a witness to be trusted beyond the average of witnesses, more to be trusted even in this respect, supposing there were no question of interest, than an ordinary solicitor who testifies to the contents of a will. He has other affairs to attend to, he has many wills to read, and he has no special or particular interest in the disposition of the property of the testator. Therefore we have a witness peculiarly likely to know what the contents of the will were.

Besides that, we have a witness of unimpeached and unimpeachable integrity. We have the gratification of knowing, in deciding this case, that there has been no question raised as to the credibility of Miss Sugden, and this appears to be an answer to that assumed danger which might apply to other cases in allowing such proof as this to establish wills. The present case has, in my opinion, nothing to do with a case where the credibility of the witness is contested; it does not make the witness's testimony more admissible, but it does add enormously to the weight of it, when you find that the opponent does not dispute the honesty and truthfulness, the entire integrity and veracity of the witness.

The case is singular in that respect, and I should think it is very likely to remain singular, as regards subsequent cases; therefore there is no danger in admitting this evidence in this particular case, and I see no reason why we should refuse to do justice now because other persons, not credible witnesses, may be induced in other cases to attempt to substantiate fictitious wills.

But, no doubt, this observation may be made—that Miss Sugden is an interested witness. Here again it is not alleged that the interest is such as to impair her credibility. If it had been, I could have understood the objection, but as it is admitted that she is a veracious person, the objection as to interest fails. The law at one time considered it impossible that a person biassed by the smallest interest could tell the truth, but that law was found so utterly opposed to human experience that it was abrogated by

the legislature, and interested witnesses daily give evidence in our tribunals, and, subject to the observation that they may be biassed by their interest so as to some extent to affect the weight of their testimony, their evidence is received without doubt or question. No doubt, in the case even of a credible witness, even in the case of a witness without interest, it is desirable, if possible, to procure confirmation to shew the accuracy of the memory of the witness, and for that purpose only. But the moment you admit the witness to be credible, the desirability of the confirmation appears to me to apply just as much to that portion of the evidence as to which he is not interested as to that in which he is.

Now, as regards the evidence of Miss Sugden, she is confirmed in every material respect, except as to the residue of the personal estate. I am not going to repeat the elaborate judgment which has been already given as regards the nature of the evidence, but I will take that to be sufficiently established.

As regards the residue, if you shut out the post-testamentary declarations, there is no actual confirmation except one, that is, the confirmation of probability.

Now, I must say that in testing the unsupported testimony of a witness, especially of an interested witness, the position of the testator, and the probability of the disposition which he is said to have made, appear to me to be important elements; and how stands the matter here as far as these are concerned? I am not in a position to give accurate figures, although I have done my best to ascertain the value, and, therefore, what I am saying must not be considered to be quite precise, but from the statement made to us, and which was made in the Court below, I should imagine that the testator died possessed of property worth about 300,000*l.*, probably more, but not less. He is said to have had between 7000*l.* and 8000*l.* a year in freehold estates, and about 60,000*l.* in personalty, or thereabouts. The state of his family was this: he had had a great number of children; all his daughters were married except one, and all his sons were dead except one, although two of the sons had left a child or children. Of all his children, that one single daughter remained with him, and she was, one might say, the prop and solace of his life. That he entertained a great, and,

1876

SUGDEN v. LORD ST. LEONARDS.

Jessel, M.R.

one might say, a deserved affection for her, is clear, from all the testimony we have had before us; that it was his moral duty to provide for her, and to put her in a situation of life such as not greatly to diminish her habits of comfort, or even of luxury, is plain and beyond controversy. Whether he had promised to do so or not does not appear to me to be material; but it is clear he had promised to do so, even before the making of the last will.

Under those circumstances, what does she take by the interest, or rather combination of interests, given her by the will? There, again, my figures are probably not accurate, although they are as nearly accurate as I can make them. She takes a portion of 6000*l.*, which, although it is more than some of her sisters seem to have had, appears to have been calculated with the view of making her equal in that respect with the most favoured of them, although not beyond. Of course, it is perfectly natural that the testator should desire that the unmarried daughter should be at least as well provided for as the married daughters were on the occasion of their marriages; and upon this there is confirmation. She takes a life interest in a farm which is stated to be worth 350*l.* a year. I am not acquainted with the exact age of Miss Sugden, but she can be no longer very young; and I take the value of her life interest in that farm to be considerably less than 3000*l.* She takes a house which appears to have cost 1500*l.*, and some meadows, the exact value of which does not appear, but which again I say 3000*l.* may very fairly represent. That makes 12,000*l.*; and she takes, besides, one-third of the residue, the exact amount of which again does not appear. Of course there are large legacies to be deducted from it, and I should think 10,000*l.* or thereabouts would fairly represent the one-third. But assuming it to be 13,000*l.*, which is a very large figure, considering the deductions to be made, then you have not more than 25,000*l.* as the provision made for this lady, who stood in the relation I have mentioned to a testator possessed of this considerable fortune. I think it is not only reasonable to presume that he would have made this, which appears to be by no means an immoderate provision for her, but he would, as I think, have sinned in his grave

if he had done otherwise than make such a provision for the child who had devoted to him her whole life.

I think, therefore, she is amply confirmed, and that the extent of the benefit which he intended for her has not been exaggerated by her in her testimony, and this is the only point on which there was no other confirmation. Therefore, if I threw out of consideration the post-testamentary declarations, I should have arrived at the same conclusion. But if we admit them, they point still more strongly to the same conclusion. The testator is proved to have told one person that his daughter would be a rich woman, and be able to receive in the same manner as she had done in his lifetime. He told another person that she would be a wealthy woman after his death; he told her, in terms which are affecting, no doubt, and even pathetic, in speaking of her devotion to him, that she was blessed, and ought to be blessed by him as regards the disposition of his property. Can we say that these expressions of the testator have been more than fulfilled by what I may call the modest provision he has made for her by the testamentary instruments which have been admitted to probate, a provision which, in all probability, if there had not been a title in the family, would have been very much larger?

On the whole, I express my entire concurrence in the judgment which my Lord has given, and I agree with him also that, after the careful and elaborate investigation which this case underwent in the court below, after the clear, luminous, careful and elaborate judgment which was given by the distinguished judge of that court, the heir-at-law and next of kin would have done well and wisely in abstaining from pressing an appeal to this court. I think that as they have chosen to do that they ought to bear the penalty to which all unsuccessful litigants are liable, and that in dismissing this appeal we ought to dismiss it with costs.

James, L.J.

JAMES, L.J. I agree so entirely with the judgment of the Lord Chief Justice, both in the conclusions at which he has arrived and in the reasons which he has given for those conclusions, that I do not think it necessary to make more than one or two short remarks.

1876

SUGDEN v. LORD ST. LEONARDS.

James, L.J.

First, I would corroborate what he has said with regard to the admission to proof of part of an instrument where the rest is not forthcoming, by referring to the case of *Dickinson* v. *Stidolph* (1), where the judgment of the Court, consisting of the Lord Chief Justice Erle, Mr. Justice Williams, Mr. Justice Willes, and Mr. Justice Byles, was delivered by Mr. Justice Williams, probably the most eminent authority in our time on matters connected with wills. In the judgment there are the following expressions: "Secondly, it was objected that the testatrix refers to two memorandums, and only one is found. But, if she intended to adopt two instruments, and only one is found, the law requires that effect should be given to that which is found; for either the ordinary presumption must prevail that the missing paper was destroyed by the testatrix animo revocandi, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed merely because she made other dispositions of her property which are unknown by reason of the testamentary paper which contained them not being forthcoming. It is on this principle that a subsequent will is no revocation of a former one if the contents of the subsequent will are unknown. And the law is the same even if the later will be expressly found to be different from the former, provided it be unknown in what the difference consists." That is upon the point as to whether probate can be granted of a will of which only a part is known.

With regard to the testamentary declarations of the testator, I desire to say that I entirely concur in the conclusion at which the Lord Chief Justice has arrived, that those testamentary declarations are admissible and ought to be admitted as evidence. But in this case it is conceded that every one of those declarations was admissible and was properly admitted for some purpose in the cause, and thereby those declarations of the testator have become legitimately known to me. I believe them to have been made by him, and I believe them to be true, and, having those declarations before me and so believing them, it would be a judicial lie if I were to pretend that I did not act upon them in coming to the

(1) 11 C. B. (N.S.) 341.

conclusion that the evidence of the witness as to the actual contents of the will is true.

MELLISH, L.J. I am also entirely of the same opinion; and I think it is quite unnecessary that I should make any lengthened observations.

The really material questions are, of course, the two questions of fact, what are the contents of the will, and whether that will has been proved; and upon those two main important questions I am perfectly satisfied with the judgment of the judge of the court below; and I am also entirely satisfied with the reasons which have been given by the Lord Chief Justice and the Master of the Rolls here, and I say nothing more about them.

I am also entirely satisfied with the reasons which have been already given upon the question of law, whether probate of that portion of the will of which we have evidence ought to be refused, because there may be some other portions upon which we have not sufficient or any evidence. But that question, to my mind, scarcely arises in this case; because, with regard to the parts of the will that are omitted, it seems to me that we have satisfactory evidence that they did not substantially alter the provisions of which we have evidence.

With reference to the personal estate, there is no reason to suppose that any of the missing legacies, if there are any, of which we have no evidence, were given to the next of kin, that is, to the relatives of the testator. He had put down on the paper of which we have evidence the legacies which he intended to give to the different members of his family. The next of kin were all represented by counsel, and no one asked Miss Sugden whether she was confident that there were no legacies given to them, and I think I can clearly come to the conclusion, as a matter of fact, that, whatever the small legacies may have been, of which we have no evidence, they were not legacies to any members of his family, and therefore no one can possibly be prejudiced, except those persons, whoever they may be, of whom we have no evidence, and who will get no benefit whatever. No one can be prejudiced by our granting probate of the will so far as we know it.

1876

SUGDEN v. LORD ST. LEONARDS.

Mellish, L.J.

I do not at all mean in making that observation to throw any doubt on the judgment which has been given by the Master of the Rolls, and the reasons which he has given why probate of a gift of residue ought to be granted, even although we might not know the nature of the legacies of personal estate contained in the part of the will of which there was no evidence. And as to the real estate, it is perfectly plain that whatever omissions there may have been of the ultimate limitations, those omissions cannot possibly be any prejudice to the heir-at-law.

The only part of the case upon which I have any doubt, or differ at all from what has been already said, is a part which, as it appears to me, is not before us, and which it is not really necessary for us to decide. At the time of the argument, not having read the judgment of the President of the Probate Division, I was under the impression that he might have relied to some extent upon the evidence of the declarations of Lord St. Leonards respecting the contents of his will made after its execution. But, having now carefully read through the judgment, I find that he did not rely upon that evidence at all. In determining what were the contents of the will he did not rely upon, he carefully avoided mentioning any of the statements of Lord St. Leonards respecting the contents of his will, and, for myself, I am entirely satisfied with the conclusion to which he came upon that ground. I do not think it necessary for us to consider whether those subsequent declarations are admissible. I am not myself prepared to say that the decision in *Quick* v. *Quick* (1) is bad law. If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made ante litem motam, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence. But the difficulty I feel is this, that I cannot satisfactorily to my own mind find any distinction between the statement of a testator as to the contents of his will, and any other statement of a deceased person as to any fact peculiarly within his knowledge, which, beyond all

(1) 3 Sw. & Tr. 442; 33 L. J. (P. M. & A.) 146. 10 Jur. N.S. 682

question, as the law now stands, we are not as a general rule, entitled to receive.

The Master of the Rolls has referred to the several exceptions which have been made to the rule, but none of them appear to me to be applicable to this case. I think there is a most material distinction, as was pointed out by Lord Campbell in *Doe* v. *Palmer* (1), between declarations made before a will is executed, and declarations made subsequently. The declarations which are made before the will are not, I apprehend, to be taken as evidence of the contents of the will which is subsequently made—they obviously do not prove it; and wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were. When a doubt is thrown on the correctness of evidence which has been given as to the contents of a will, the declarations of the testator as to what he intended to put in his will, made either contemporaneously with, or prior to the execution of, his will, are obviously evidence which may corroborate the other testimony as to what is contained in the will. But, to my mind, they do not of themselves prove what were the contents of the will, they only corroborate the other evidence which has been given of the contents, because it is more probable that the testator has than that he has not made a particular devise, or a particular bequest, when he has told a person previously that he intended to make it, inasmuch as it shews that he had it in his mind to make such a will at the time he made that declaration. But a declaration after he has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time; it is simply a statement of a fact within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule, that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has

(1) 16 Q. B. 747; 20 L. J. (Q.B.) 367.

1876

SUGDEN v. LORD ST. LEONARDS.

Mellish, L.J.

never happened before, and may never happen again, for you then establish an exception which more or less throws a doubt on the law. It appears to me that it would be better to leave it to the legislature to make the improvement, which, in my opinion, ought to be made, in our present rules with regard to the admissibility of evidence of that description. In all other respects I entirely agree with the judgments which have been given.

Baggallay, J.A.

BAGGALLAY, J.A. The judgment which has been pronounced by the Lord Chief Justice so completely expresses the opinions which I have formed on the several questions which have been raised in the course of the argument on this appeal, that I shall abstain from saying more than that I entirely assent to that judgment, not only as regards its general conclusions, but as regards its details, and I particularly desire to express my concurrence in that portion of the judgment which has reference to the admissibility, as evidence, of the declarations made by the testator in this case, and to the unsoundness of the decision in *Quick* v. *Quick*. (1)

COCKBURN, C.J. The appeals will be dismissed with costs.

Appeals dismissed.

Solicitors for plaintiffs: *Trollope & Winckworth.*
Solicitors for defendants: *Barlow, Bowling, & Williams.*
Solicitors for interveners: *W. W. Gabriel; R. S. Taylor & Son.*

(1) 3 Sw. & Tr. 442; 33 L. J. (P. M. & A.) 146. 18 Jur N.S. 682.

[IN THE COURT OF APPEAL.]

1876
May 18.

THE ANNA. (L. 35.)

Necessaries—3 & 4 Vict. c. 65, s. 6—Money advanced for Disbursements of foreign Ship in British Colonial Port—Personal Credit—Practice.

The master of a foreign vessel lying in the port of Quebec, being without funds or credit, by means of a bill of exchange drawn upon a firm of shipbrokers in London, procured the advance of a sum of money for necessaries for the ship. The bill of exchange was accepted and paid, but the acceptors, not having received the amount of the bill from the shipowners, instituted an action against the ship for the amount of the bill:—

Held, that the Court had jurisdiction to entertain the action.

The Wataga (Sw. Adm. 165) and *The Onni* (Lush. Adm. 154) followed.

THIS was a cause of necessaries brought by Lloyd, Lowe, & Co., shipbrokers of London, against the Norwegian vessel *Anna*. The owners of the vessel appeared as defendants, and the following statement of claim was delivered:—

1. The said barque is a Norwegian vessel belonging to the defendants, and arrived in the port of Liverpool in the month of December, 1875.

2. The plaintiffs are shipbrokers carrying on business in copartnership in London.

3. About the end of October, or beginning of November, 1875, the said vessel was lying at the port of Quebec bound for some safe port on the west coast of Great Britain.

4. The master of the said ship was, at Quebec aforesaid, then and there obliged to make certain necessary disbursements to the extent of 293*l.* 8*s.* 2*d.* for and on account of and for the supply of necessaries thereto, and, being himself without funds and without credit, procured the said sum of 293*l.* 8*s.* 2*d.* for the said necessaries by means of a bill of exchange for the said amount then and there drawn by him upon the plaintiffs, and the said master thereupon advised the plaintiffs of the same by a letter, which was in the words and figures following:—

"Quebec, 6th November, 1875.

"Messrs. Lloyd, Lowe, & Co., London.

"Dear Sirs,—I have this day taken the liberty to value on you, at thirty days sight, for 293*l.* 8*s.* 2*d.* sterling, two hundred and ninety-three pounds eight shillings and two pence, in favour of Mr. Francis Gunn, of Quebec, being for the necessary disbursements of my vessel, the barque *Anna*, of Christiana, which I hope you will duly honour on presentation, and please charge to account of said vessel and owners, P. Hernandsen, Esq., of Christiana.

"Your obedient servant,

"H. W. Hansen,

"Master of barque *Anna*.

"P.S.—The above amount is duly insured from Quebec. Policy enclosed."

1876

THE ANNA.

5. The plaintiffs duly accepted and paid the said bill of exchange at maturity.

6. The said bill of exchange was accepted and paid by the plaintiffs as aforesaid in the necessary service of the said vessel as aforesaid, and upon the credit of the said vessel, and not on the personal credit of the said master, and the said sum of 293*l.* 8*s.* 2*d.* still remains wholly due and owing to the plaintiffs.

The defendants demurred to the statement of claim upon the grounds that a foreign ship could not in this court be made answerable for a claim in respect of necessaries supplied in a foreign port, and that the plaintiffs were, under the circumstances stated in the statement of claim, in no better position than the persons who supplied or advanced the alleged necessaries at Quebec aforesaid.

P. D.

March 7. *Myburgh*, in support of the demurrer. If the decision of Dr. Lushington in the case of *The Wataga* (1), that necessaries supplied to a foreign ship in a colonial port are within the purview of the 6th section of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), is to be considered as unshaken, it must be admitted that this Court is bound to follow it. It must, however, be remembered that possibly the judgment in that case could be supported on the ground that the ship was on the high seas at the time when the necessaries were supplied. The wider construction there put on the statute is scarcely consistent with the grounds of the previous decision of the same learned judge in the case of *The Ocean* (2), or with the language of the judgment subsequently delivered by him in the case of *The India* (3), where it was held that the statute did not extend to give the Court of Admiralty jurisdiction to entertain claims for necessaries supplied to a foreign ship in a foreign port. In the present case the *Anna* was not on the high seas at the time when the necessaries were supplied, but clearly within colonial jurisdiction, as she was lying in the river at Quebec, and it can hardly be denied that the language of the Court in the case of *The India* (3) would apply equally to all cases where necessaries have been supplied to a foreign ship elsewhere than on the high seas or in England or Wales. According to the general practice where statutes are intended to apply to the colonies,

(1) Sw. Adm. 165. (2) 2 W. Rob. 368.
(3) 32 L. J. (P. M. & A.) 185. 9 Jur N.S. 417

the colonies are expressly mentioned, but in this statute there is nothing to lead to the inference that the legislature intended to give a power to this Court to proceed in rem in cases where necessaries have been supplied in colonial ports. If, however, the Court is of opinion that the case of *The Wataga* (1) is binding on it until reversed by superior authority, there are two other grounds on which the defendants contend that the demurrer ought to be allowed.

[SIR ROBERT PHILLIMORE. No points for argument have been delivered. I think it very desirable that the practice of the Court should be assimilated to the practice of the common law divisions in this respect, and that in all cases to be argued on demurrer the points to be relied upon in argument should be delivered.]

The second point taken by the defendants is, that the statement of claim does not allege that at the time when the money advanced to the master of the *Anna* was expended in necessaries the master of the *Anna* was without credit.

Thirdly, it appears by the letter set out in the statement of claim that the money advanced was advanced against a bill of exchange, which was accepted by the plaintiffs on the personal credit of the owners. In these circumstances there is no claim against the ship, as the plaintiffs have elected to look for payment to the owners, and not to the ship, and the allegation to the contrary in the sixth article of the statement of claim is inconsistent with the rest of the case.

E. C. Clarkson, on behalf of the plaintiffs. With regard to the question of jurisdiction, the decision in the case of *The Wataga* (1)—a decision acquiesced in since 1856—is conclusive; moreover, the state of the law, as settled by that decision, was known at the time of the passing of the Admiralty Court Act, 1861 (24 Vict. c. 10), yet in that Act is to be found no enactment with regard to necessaries supplied to foreign ships in colonial ports.

[SIR ROBERT PHILLIMORE referred to the case of *The Ella A. Clark*. (2)]

As to the remaining arguments of the defendants, even if it

(1) Sw. Adm. 165. (2) Br. & L. Adm. 32; 32 L. J. (P. M. & A.) 211. 9 Jur N.S. 312.

1876

THE ANNA.

were not competent to the plaintiffs to shew by the evidence of surrounding circumstances that the advance was made on the credit of the ship, it must be presumed that she is liable, inasmuch as the necessaries were supplied for her use: *The Perla.* (1) In truth, however, the 6th section of 3 & 4 Vict. c. 65, conferred on the Court of Admiralty jurisdiction over claims for necessaries supplied to foreign ships, quite irrespective of the question whether the necessaries were or were not furnished on the personal credit of the shipowner.

[SIR ROBERT PHILLIMORE referred to *The Onni.* (2)]

Myburgh, in reply, referred to *The Two Ellens* (3), and submitted that the case of *The Onni* (2) had no application, as in the present case it was clear that the plaintiffs had accepted the bill of exchange on the express terms, as was shewn by the letter set out in the statement of claim, that there should be no lien on the ship, but that the amount of the bill should be settled in account with them personally.

SIR ROBERT PHILLIMORE. This discussion relates to a demurrer to a statement of claim. The Norwegian vessel *Anna* arrived in the port of Liverpool in the month of December, 1875, and her master, finding himself without funds, carried on board goods to the amount of 293*l.* 8*s.* 2*d.*, for the purpose of supplying necessaries to the vessel, and borrowed the money by means of a bill of exchange, of which the master advised his owners in these words:—[His lordship here read the letter set out in the statement of claim.] Now three points have been made in support of the demurrer, and it will be convenient to take the first point last, because it is the one of greatest importance. The first of the two latter points is that it appears upon the statement of claim that the money, which had been raised by the bill of exchange to be expended in necessaries, was obtained on the captain's personal credit. I am of opinion that that point is untenable. The third point is that the bill of exchange was accepted by the plaintiffs for the owners of the vessel. That depends on the construction, in some measure, of the letter I have read. It is said that there is no claim upon

(1) Sw. Adm. 353. (2) Lush. Adm. 154.
(3) Law Rep. 4 P. C. 161.

the ship, and that the master of the vessel supplied the necessaries, and has to look only to the owners. Now, in the first place, it is distinctly pleaded in the sixth article of the statement of claim that :—[Here his lordship read the 6th article of the statement of claim.] It is contended that the letter I have read cannot receive any construction from the statement contained in this 6th article. I am by no means certain that it would not be proper in this case, in order to understand the letter to which I have referred, to take into consideration the surrounding circumstances, and the question then would have to be determined after evidence of those surrounding circumstances. But I do not think it necessary to place the overruling of the demurrer upon that ground. I consider the question that was decided by my learned predecessor in the case of the *The Onni* (1), is substantially the same as the point raised here to-day. In that case he said: " . . . I must now consider my jurisdiction entirely governed by the 3 & 4 Vict. c. 65, s. 6. That section merely says that the Court shall be authorized to decide all cases for necessaries supplied to any foreign ship or sea-going vessel, and to enforce payment thereof. It makes no distinction whether the necessaries were furnished on personal credit or not. I have held that the advance of money for the procuring of necessaries is within the equitable construction of the statute. Can the present case be considered as a case of that kind? I can only judge by the information afforded me, and according to that affidavit the master obtains the money to procure necessaries by means of this bill, and the money so procured was duly expended for the benefit of the ship. I think in these circumstances I am justified in allowing this claim." In the present case the money was obtained by means of the bill of exchange to provide necessaries for the benefit of the ship. I am unable to find any substantial distinction on the matter between the two cases. I consider the case of *The Onni* (1), therefore, is a precedent for the court in the present case.

I have only to advert to the first point raised in the discussion to which I referred, namely, the question as to whether the Court has any jurisdiction in the circumstances of this case: the circumstances of this case being briefly that a Norwegian vessel

(1) Lush. Adm. 154.

1876

THE ANNA.

has obtained necessaries when lying in the port of Quebec, and the plaintiffs, the ship's brokers, bring this suit under the 6th section of 3 & 4 Vict. c. 65. Now it was very properly admitted by Mr. Myburgh in the course of his argument that this point as to the question of jurisdiction was in reality, so far as necessaries are concerned, decided by Dr. Lushington in the case of *The Wataga.* (1) It is not necessary to read the whole of that case, but that learned judge considered fully the effect of the statute, and came to a distinct conclusion. There an American ship had been supplied with necessaries, and had been arrested. The judgment was given in 1856, and, as far as I know, it has never till now been questioned. I think also that it has received confirmation from the subsequent statute, 24 Vict. c. 10, s. 5. It appears to me that the argument which has been addressed to me by Mr. Clarkson upon that point is a sound argument, but in any case I should not think it right, if I entertained an opinion, which I by no means express, that Dr. Lushington had erred in his judgment, and had not taken the right view, to take upon myself to reverse his judgment, which I understand he had long considered; and I shall leave the parties to resort, if aggrieved by my adhering to his decision, to the court of appeal. I am therefore of opinion that I ought to overrule the demurrer, and I so do. I give leave to the defendants to appeal.

C. A.

The defendants appealed.

May 18. *Myburgh* (with him *Milward, Q.C.*), for the defendants. The question is whether 3 & 4 Vict. c. 65, s. 6, applies to necessaries supplied to a foreign ship in a colonial port. At the time when that Act was passed, the Court of Admiralty had been held to have no jurisdiction in the case of necessaries supplied to a ship in England whether English or foreign, and this was intended merely to alter that state of the law, as appears from the words, "within the body of a county or upon the high seas." But it was never intended to apply to ships in any part of the world. This was decided by Dr. Lushington in *The*

(1) Sw. Adm. 165.

Ocean (1), though he afterwards made a contrary decision in the case of *The Wataga* (2), which no doubt is against the defendants, and is, as they contend, bad law. The ship must be either in the body of a county or on the high seas, and there is nothing in the Act to shew that its operation was to extend to foreign ports or to the colonies. In the case of *The India* (3) it was decided that the statute did not apply to necessaries supplied in a foreign port, and where is the difference? *The Ella A. Clark* (4) is again in favour of the defendants.

[JAMES, L.J. Foreign owners would be much injured if the defendants were to succeed. The masters of their ships could not then in cases of emergency be able to raise money for their wants.]

The facility given to masters is, in fact, a disadvantage to ship owners. The Act 24 Vict. c. 10, ss. 4 and 5, does not affect this case.

E. C. Clarkson, for the plaintiff, was not called upon.

Judgment, C. A.

JAMES, L.J. This case really does not require a formal judgment. Dr. Lushington, twenty years ago, in a very elaborate judgment, decided upon the construction of the statute, and that judgment has been acted upon ever since. The legislature has since that time continually dealt with the matter, and if there had been any notion that the decision was wrong they would have made an alteration accordingly. We have no hesitation in coming to the same decision to which Dr. Lushington came twenty years ago. It is too late to raise questions of jurisdiction after that lapse of time.

Upon the other points it is perfectly clear what the decision should be.

BAGGALLAY, J.A., and LUSH, J., concurred.

Appeal dismissed with costs.

Solicitors for plaintiffs: *H. W. Collins & Robinson, Liverpool.*

Solicitors for defendants: *Gregory, Rowcliffe, & Co., for Hull, Stone, & Fletcher, Liverpool.*

(1) 2 W. Rob. 368.
(2) Sw. Adm. 165.
(3) 32 L. J. (P. M. & A.) 185. 9 Jur NS. 418.
(4) Br. & L. Adm. 32; 32 L. J. (P. M. & A.) 211. 9 Jur NS. 362.

1876
May 4.

[IN THE COURT OF APPEAL.]

THE CARGO EX WOOSUNG. (6865.)

Salvage—Agreement—Queen's Ship—Indian Government—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 484.

Port 275.
PP.6.

The commander and crew of a Queen's ship have the same rights to remuneration for salvage as the master and crew of a merchant ship, but

Quære, whether they can make with the captain of the wrecked ship an agreement as to the amount.

The commander of a Queen's ship, sent to render help to a wrecked ship, cannot impose terms and refuse to give salvage services unless those terms are accepted.

A ship belonging to the Bombay Government with a hired commander and crew is, with respect to the provisions of the Merchant Shipping Act, 1854, s. 484, in the same position as a Queen's ship with commissioned officers.

THE *Woosung*, a steamer of 1623 tons register, was on her voyage from Calcutta to London with a cargo of indigo, silk, shellac, &c., of the value of about 500,000*l*. In the night of the 20th of February, 1874, she struck on a reef off the island Kotama, in the Red Sea. The passengers and crew were next morning landed on the island, and a boat was sent to a Turkish town some twenty-five miles off, the governor of which came down, accompanied by a Greek captain or merchant. With this Greek, who was able to engage Arab men and boats, Captain Carlin, the master of the steamer, made an agreement for saving and landing the cargo, the Greek receiving one-third of the proceeds of the salvage. A boat sent from the *Woosung*, afterwards intercepted a passing steamer, and by this means news of the wreck was telegraphed to London. The Salvage Association in London, acting as agents for the owners of the cargo, thereupon applied to the Under-secretary of State for India to have one of the Queen's ships sent to the wreck in order to protect and save the cargo, undertaking to pay for the coal consumed and to make a present to the officers and crew. The under-secretary accordingly telegraphed to Aden, and, in obedience to his instructions, the political resident at Aden sent off to the wreck a steamer called the *Kwangtung*, belonging to the Bombay Government; the commander, Captain Elton, and the officers, being uncovenanted civil servants of the Bombay Government

holding no commission under the Queen, and apparently liable to be dismissed with a month's pay, and not entitled to any pension. The directions given by the resident to Captain Elton, were contained in the following letter.

"Sir,—I have the honour to annex for your information a note respecting the wreck of the S. S. *Woosung* on the island of Kotama, and to request you will proceed to the spot at full speed after landing the relief detachment at Perim. You will notice the *Woosung* is said to be holed in several places, and to be full of water. If practicable, your stay at Kotama for salvage services should not exceed forty-eight hours, as your early return to Perim is desirable to convey to Aden the released detachment of the 2nd Grenadiers, and other details. The *Kwangtung* can return to Kotama, if it should be considered advisable on the receipt of your report, but from the condition of the ship it seems doubtful whether much cargo can be saved."

The *Kwangtung* reached the wreck on the 6th of March, and, as was alleged on her behalf, found the Arabs plundering, and that it was not likely she would be able to save the cargo. The captain of the *Woosung* requested the captain of the *Kwangtung* to undertake the salvage on the same terms as those which the Greek had accepted. The captain of the *Kwangtung* declined, and, after much bargaining, the following agreement was, on the 9th of March, made and signed:—

"It is this day mutually agreed between Captain Carlin of the *Woosung* and Captain Elton of the *Kwangtung*, i.e. the latter agrees to save as much as possible of the cargo, gear, tackling, and fittings belonging to the above-named vessel, including everything on deck or below that he possibly can, and consign the same to Messrs. Luke, Thomas, and Company, at Aden, to be retained in their custody until further advices. After the sale of which, and after all expenses have been paid thereon, Captain Carlin on his part agrees to pay to Captain Elton or his agents one half of the proceeds of the same. In this agreement Captain Elton finds all necessary men, gear, and appurtenances for the discharging, unrigging, shipping, and unshipping, also for landing at Aden; and Captain Carlin holds himself irresponsible for any

1876

CARGO EX WOOSUNG.

accident or damage that may accrue to the *Kwangtung*, either alongside the *Woosung* or otherwise."

The captain and crew of the *Kwangtung*, working under great heat and in putrid stench, raised and saved a considerable portion of the cargo, which ultimately realised on sale about 37,000*l.* The Greek was paid by the owners of the cargo a sum of 16,000*l.* for cargo saved, and for abandoning all claim and interest in the cargo remaining. The agent of the Salvage Association on the 27th of March came down and took charge of the wreck, and refused to permit the captain and crew of the *Kwangtung* to continue the salvage on the terms of the agreement, but offered them 100*l.* a day, which they refused, and left off work. Some further portion of the cargo was saved, but on the 12th of April a gale came on, and the *Woosung* went to pieces.

The captain, officers, and crew of the *Kwangtung*, with the consent of the Admiralty, presented their petition in the High Court of Admiralty to recover one half the value of the property salved by them. The consent of the Admiralty was given by the following letter, signed by the secretary to the Admiralty :—" Merchant Shipping Act, 1854. Admiralty, 22 July, 1874. I hereby certify that the Lords Commissioners of Admiralty consent to the commanding officer of H.M.S. *Kwangtung*, of the Bombay marine, prosecuting his claim as he may be advised for salvage in respect of services rendered by such ship under his command to the steamship *Woosung*." The Salvage Association had previously applied to the Admiralty to refuse this consent, offering to pay the captain any sum which the Under-secretary of State for India might award.

The defendants, by their answer, denied that the services, and danger, and sufferings of the officers and crew of the *Kwangtung* were so great, and alleged that they had been guilty of misconduct. They also alleged that the agreement was inequitable, and one which the captain of the *Woosung* had no power to make, and was not binding on the owner of the cargo. Also that the *Kwangtung* had been sent under an agreement between the Salvage Association and the secretary of state, whose servant Captain Elton was. Also that Captain Elton was an officer in the Queen's service, in command of one of her ships sent on a special service,

and that he had no right to refuse to undertake salvage work except on his own terms. They submitted that Captain Elton, the officers, and crew of the *Kwangtung*, were entitled to reasonable salvage only.

The cause was heard before Sir Robert Phillimore, judge of the High Court of Admiralty.

Butt, Q.C., Herschell, Q.C., and *Edwyn Jones*, for the plaintiffs.

Sir H. James, Q.C., Cohen, Q.C., and *Phillimore*, for the defendants.

Witnesses were examined before the judge, and the effect of their evidence is stated in the following judgment:—

Judgment, P. D.

June 25, 1875. SIR ROBERT PHILLIMORE [after stating the facts of the case]. The question debated before the Court was as to the validity of the agreement. It was contended that it was void by reason of its exorbitancy, and also on the ground of collusion, but that the evidence did not support.

Now, with regard to agreements of this kind, what the probable amount which the Court would award, in the absence of any agreement as to salvage, does not furnish a satisfactory test as to the validity or invalidity of the agreement. The rule of the Court was laid down by Dr. Lushington in *The Theodore* (1) and in many other cases. In the case of *The Theodore* (1) it is concisely stated as follows: "The Court is very much indisposed to set aside an honest agreement, but it must be satisfied that the agreement is honest. Where there is any doubt, its rule is to adhere to the agreement; and the Court would be just as ready in favour of salvors to set aside an agreement if satisfied that it was wholly inequitable." In the very useful work published on the practice of this Court by Mr. Williams and Mr. Bruce, the cases relating to this point of law are very carefully examined, and the result is, in my judgment, very ably stated. (2) "It is submitted," the learned authors say, "that the true principle is that the agreement of the parties must bind unless the Court is led to the conclusion that it was entered into in ignorance of material facts or induced by fraud. Where the amount is inadequate or exorbitant

(1) Sw. Adm. 351, 352. (2) Page 131, n.

1876

CARGO EX WOOSUNG.

that fact can only be regarded by the Court as pointing to the probability that there was some unfair dealing at the time of the making of the agreement. This applies with especial force to cases where persons in extremity, in order to obtain assistance, have entered into an agreement to pay an exorbitant sum to the salvors."

Now, the first thing the Court has to consider is, who are the parties to this agreement? Are they ignorant people, or is it one ignorant, and the other cunning and trying to overreach the ignorant man? or is it made between persons perfectly capable of understanding what they are about and the conditions into which they were entering? It cannot be doubted that they belonged to the latter category. Captain Carlin, of the *Woosung*, and Captain Elton, of the *Kwangtung*, were surely competent persons so far as that consideration goes.

The next thing the Court has to consider is, whether the agreement was made deliberately. Now the captains have been examined, and there is no reason whatever to doubt the credibility of the evidence given by Captain Carlin. He says, fairly enough, he did not know anything about what the law was as to salvage, and he did not know anything about the law as to Her Majesty's ships in the public service, but that he bargained a long time with Captain Elton to take one-third, and it was only when the bargaining failed that he agreed to give one-half. It was entered into, therefore, very deliberately and by competent persons.

Now the sum was very large, but it is stated that the whole would go to the Secretary of State for India, and that the captain was to receive one-tenth. It seems that there is not much distinction to be drawn between a ship belonging to the Bombay Government and a ship belonging to the Queen, and the captain of the *Woosung* says that he was not aware that a ship in the Queen's service could not claim for salvage services—that is to say, on the ground of services rendered by the ship. He said, however, that if he had been aware it would have made no difference whatever in his arrangements. I must, however, observe, without entering into the considerations of how far ignorance of the law could possibly affect this agreement, that it does not appear from the evidence that the ship herself was any agent in the salvage

of the cargo. The service of salvage was essentially rendered by the men who were on board the ship, not, as in most cases in this Court, by the agency of the steam power of the vessel. I am of opinion, as I have already expressed, that there was no disability affixed by the law on Captain Elton to render salvage services and to obtain the usual and proper remuneration, whatever that may be, for his services. Coupling with that the permission of the Lords of the Admiralty to the institution of this suit, the result is that the Court has to consider the claim of Captain Elton to remuneration for salvage service in this case as it would that of an ordinary merchant captain. The agreement having been entered into by competent persons, and the charge of collusion and misconduct having been withdrawn, does the amount itself warrant the Court in coming to the conclusion that this sum is so grossly inadequate or exorbitant as to render it proper that the Court should set the agreement aside, having regard to the principles of the law, which I have stated already? Now we must consider a little the facts of the salvage. In this case it was rendered, it is true, in one sense without much personal danger to the salvors; but that is only in one sense, because the evidence shews, I regret to say, that of those who rendered those salvage services many of them were great sufferers from the worst of all dangers, perhaps, to sailors, the disease and the mischief which was generated by this putrid stench, and by the noxious gases which prevailed at this time. [His lordship then stated the evidence on this subject, and particularly as to the services of the first officer of the *Kwantung*.] The next circumstance I have to observe upon is, that the evidence shewed, if it were necessary to establish the point, that the manner in which the Arabs worked was not to be compared in its efficacy or its usefulness to the manner in which the Europeans worked. It is said (and this was, I think, the main argument addressed to me on behalf of the defendants) that this contract is void by reason of duress and compulsion. Now, in one sense the services of every salvor are unwillingly and under duress accepted; the lesser evil of losing a portion of the profit and property being submitted to rather than the greater evil of losing all, so that in that sense all salvage services are accepted under compulsion. But there is no com-

1876

CARGO EX WOOSUNG

pulsion or duress of a criminal character, unless, indeed, all reasonable limits are transgressed by the salvors, or there has been a use of false representations or the excitement of ungrounded fears in order to procure the acceptance of their services. But I look in vain for any element of that kind in the present case, and if I compare it with the salvage agreement made with the Greek, and the payments made to others, such as the stewardess and the engineer, I must say that the charge of compulsion upon this and upon other grounds entirely fails. The services lasted more than six days, and were perfectly effectual, but I think it unnecessary to travel further into that question, because I have not to consider, as I wish to be distinctly understood, whether half the proceeds would be the amount which I should award if it was an ordinary salvage service. The question is, having regard to the circumstances I have stated and to the principles of law to which I have adverted, whether this amount of itself presents such features of what is exorbitant and inequitable as to induce the Court to do that which it sometimes does very reluctantly, that is to say, interfere with an agreement made between competent parties. I must decline to do so on the present occasion, and I must pronounce for the validity of this agreement.

The defendants appealed.

C. A.

Sir H. James, Q.C., Cohen, Q.C., and *Phillimore,* for the defendants. The plaintiffs in this case are in the Queen's service, and can only recover what is sanctioned by the Admiralty. This is provided for by the Merchant Shipping Act, 1854, ss. 484 and 485. No doubt there was an agreement, but salvage agreements have always been held by the Court of Admiralty liable to be reopened: *The Helen and George.* (1) This agreement was with the master, and though no doubt he is for many purposes agent of the owners, he is not their agent so as to enter into an inequitable agreement. There might have been hardship and suffering, but there was no danger in the case, and except in very small amounts, and in the case of derelicts, the Court has never awarded a half as salvage: *The Inca.* (2) The agreement was one-

(1) Sw. Adm. 368. (2) Sw. Adm. 370.

sided, for the salvors were not forced to go on. The Greek, no doubt, was to have one-third, but then he had to hire boats and Arabs. But further, this agreement was controlled by the agreement made in London, in pursuance of which the *Kwangtung* was sent to the wreck. She was sent on purpose to give help and had no right to make any bargain at all. Suppose that a ship is ashore in England and the owner sends down a tug to help, can the owner of the tug when she is there refuse to help except on exorbitant terms?

Butt, Q.C., and *Edwyn Jones*, for the plaintiffs. The officers of the *Kwangtung* are not commissioned officers, and are only engaged by the month, and would get no pensions if injured. No doubt a man-of-war would be bound to render service, but she was not a man-of-war, and her officers and crew were not bound to incur risk and suffering. If they do, they have a right to make terms for so doing. The agreement made in London is too vague and amounts to nothing. The master of a stranded ship has in such cases power to bind his owner, and the power of the Court of Admiralty in setting aside any such agreements is no greater than that of any other Court, though it has to deal with such agreements more often than other Courts. The principle on which they are set aside is always fraud in some shape. Here not even duress can be alleged, for the Greek was there and had got out a good deal of cargo. His agreement has been acted on, and after all the difference between them is only that between one-third and one-half. If Captain Elton had agreed for one-third it must have been good, and how can the agreement be declared absolutely void because it is for one-half? As to the Merchant Shipping Act, we have the sanction of the Admiralty.

Judgment, C. A.

JAMES, L.J. I am of opinion that, having regard to the admitted facts of this case, this agreement cannot stand as a final settlement of the amount to be paid as a remuneration to the captain, officers, and crew of the ship *Kwangtung*.

The circumstances of the case are very simple. The ship *Woosung* was wrecked on a reef in the Red Sea, and was in a position of imminent peril. The lives of the passengers and crew were saved; but, as far as the ship itself is concerned, she was in

1876

CARGO EX WOOSUNG.

such peril that she never was rescued, but went to pieces; and the cargo was going out of her when she was on the reef in this state of the most imminent peril. The ship being in that position, by means of a passing ship information of the accident was sent to London to certain persons interested in the ship and cargo. Thereupon they applied to the India office, and the result of this was that the India office gave directions to the proper authorities at Aden to send a ship to the rescue of the *Woosung;* the agent of the Salvage Association offering to reimburse the expenditure for coal consumed on board the ship to be sent, and to make presents to her officers and crew. It was contended by Sir Henry James that this amounted to an agreement which precluded any right to salvage afterwards. I do not think that it can be fairly said that it in any degree whatever interfered with what otherwise would be the right of the captain and crew as to the salving of the ship, and so far they remained in the position of salvors. It was settled in the case of the *Dalhousie* (1), that having regard to the peculiar position of the captain and officers in the Bombay marine, they are to receive such salvage as would be allotted to the officers and crews of merchant vessels in similar circumstances. That being so, the political resident at Aden ordered Captain Elton to go to the ship, and directions were given to him. [His lordship read the letter.] Then the captain, under those directions, does proceed, and I think it was his duty to render his services—all reasonable services—upon the usual terms, that is to say, on receiving such a salvage reward as would be allotted to the officers and crew of a merchant vessel under similar circumstances. He was there to use his ship in a reasonable manner for the protection of the ship and cargo, but when he got there he made the bargain now before us for the use of the ship, the officers, and men, for the purpose of saving the fittings of the disabled ship, and as much as possible of the cargo, for all which salvage services one sum is to be given, and that is one half of the salved property. Now, that is an agreement which upon the face of it cannot stand. If it had been an agreement between the captain of an ordinary merchant ship, beyond all question this salvage remuneration would have included everything—the ship, the officers, and

(1) See note at end of case, p. 271.

the crew—being the price given for the whole salvage services. It appears to me that this alone would shew it to be utterly impossible that this agreement can stand as fixing the price to be paid for the services rendered by the officers and men alone. It is one entire consideration. We have no means of determining what proportion is to go to the ship, and what to the officers and crew, and therefore we are driven to find some other mode of ascertaining how much the officers and crew are to receive. But independently of that, it seems to me that it would be pessimi exempli if a person in the position of Captain Elton, sent out to give assistance, is not to be content with the salvage which could be awarded to him, but could say to the master of a wrecked ship, "If you do not accept my terms, I will go away with my ship, and leave you to your fate, though I have been ordered to come here for the purpose of assisting you." It would be holding out a very dangerous precedent if any public servant under such circumstances could be allowed to say, "I will not do that which I have been ordered to do unless you will agree to my terms." And it is clear that except under circumstances of extreme pressure, no one would have agreed to pay half of the proceeds of the cargo. The agreement cannot stand, but the plaintiffs are of course entitled to a fair and indeed a liberal remuneration, the amount of which will have to be considered.

BAGGALLAY, J.A. I am of the same opinion, and I entirely concur with what has been said by the Lord Justice, that the parties are not bound by what took place in London.

The second question is, however, the most important, whether Captain Elton was at liberty to enter into this agreement. He was acting under orders as in command of a ship which belonged to Her Majesty, and he was ordered to go and protect property in the Red Sea. Without actually deciding the question, I think that it was his duty to render all the service he could, and that it was not competent to him to make this agreement. That view is borne out by the 484th and the following sections of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). [His Lordship then read them.] The 484th says that there shall be no claim for salvage on behalf of the ship. The 485th lays down the rules under

1876

CARGO EX WOOSUNG.

which the commander and crew may proceed to recover remuneration for salvage, and the 486th prescribes minutely the steps which the commander and crew are to take when they have rendered salvage services. That last section appears to negative the power of an officer commanding a ship belonging to her Majesty to enter into such an agreement as this which is before us. But it is unnecessary to decide that question, because, in my opinion, the agreement was not one which could be allowed to stand. Two cases have been referred to in the course of the argument. One is the case of *The Helen and George* (1), where it was held "that salvage would be upheld unless proved to be very exorbitant, or to have been obtained by compulsion and fraud." Therefore, the ground of exorbitancy of the agreement would be sufficient to set it aside. The case of *The Inca* (2) laid down this rule, that a moiety of the property salved, with costs, is the maximum of the remuneration that should be allowed to the salvors. Here is, then, a moiety of the property saved not in the hands of those in whom it ought to be, but claimed for the services of the officers and crew, entirely omitting from consideration any services for the ship employed. That alone would be sufficient to shew that this agreement was inequitable. But beyond this we have this fact, that at the same time services were rendered by a Greek trader, who was to receive one-third of the proceeds, and on whom was cast the obligation of providing boats and necessary appliances, and he had to pay a heavy price to secure the services of an interpreter. Therefore the case falls within that of *The Helen and George* (1), and the agreement cannot stand.

LUSH, J. I am of the same opinion. Even if Captain Elton could have entered into any agreement, the agreement before us is not one which could stand. As the learned judges have already delivered their judgments, it is not necessary for me to do more than say that I think that Captain Elton was precluded from entering into any such agreement. He was an officer sent on that special service, and it was not competent for him to stipulate for payment. Although he was not an officer in the navy, he was not in the position of a merchant captain. The provisions on this

(1) Sw. Adm. 368. (2) Sw. Adm. 370.

subject contained in the Merchant Shipping Act are entirely consistent with public policy, and are such as the Court would act upon without express legislation on the subject.

1876

CARGO EX WOOSUNG.

Appeal allowed.

Their lordships then expressed their opinion that the compensation ought to be on a liberal scale.

After some discussion, the amount to be paid to the India Office for the master and crew of the *Kwantung*, was agreed to at 6000*l.* (1) The costs in the Admiralty Court to be paid to the respondents, those of the appeal to the appellants.

Solicitors for plaintiffs: *Kearsey, Son, & Hawes.*
Solicitors for defendants: *Waltons, Bubb, & Walton.*

---

(1) THE DALHOUSIE.

1875
June 8.

Queen's Ship—Salvage.

THIS was a suit by the commanding officer and crew of the *Dalhousie*, a steamer belonging to the Bombay Government. On the 26th of July, 1873, the *Dalhousie*, cruising in the straits of Bab-el-Mandeb, saw the *Azalea*, a steamer of 1158 tons, ashore on rocks off the island of Perim. When the *Dalhousie* came up the master of the *Azalea* asked for assistance, and the *Dalhousie* attempted to tow off the *Azalea*, but without success. The men of the *Dalhousie* then proceeded, in great heat and stench and with great fatigue, to get up the cargo from the *Azalea* and put it on board the *Dalhousie*. The whole of the crew of the *Dalhousie* were engaged in the work, which was laborious and unhealthy, and by the 31st of July 800 tons of cargo were on board the *Dalhousie*, with which she went to Aden, leaving men on board to protect the *Azalea*. The *Dalhousie* returned to the wreck and saved more cargo, which was then landed at Aden; and in August the *Dalhousie* returned and left her second officer and fifty men to assist in transferring the cargo to a steamer called the *Orchis*. The operation was continued till the 9th of September. The *Azalea* then became a complete wreck. The cargo salved and taken to Aden was valued at 22,400*l.*

Milward, Q.C., E. C. Clarkson, and *Goldney*, for the salvors.
Butt, Q.C., and *Myburgh*, for the owners of the cargo.

SIR ROBERT PHILLIMORE, in delivering judgment, said that the salvage service was considerable, and that, though there was no danger from the sea, there was great

1875

THE DALHOUSIE.

danger from the unhealthy work to be done. But in this case the steamer, being in the Queen's service, could not be considered as a salvor, though the officers and men had rendered great services. The protection afforded against the Arabs was to be borne in mind, though not to be put too high in estimating the amount. The remuneration must be to the officers and men, excluding the ship; and his Lordship awarded them 4500*l.*

1876
May 1.

THE MEDINA. (N. 57; N. 235.)[1]

Salvage—Inequitable Agreement—Award for Life Salvage.

5 PD 181-2
185-6,

An English steamship, bound from Sumatra to Jedda, having on board as passengers 550 pilgrims, was wrecked in the Red Sea. The pilgrims took refuge on a rock where if bad weather had set in they would have been exposed to imminent danger. In answer to signals of distress a steamship belonging to the plaintiffs came up, and her master refused to rescue the pilgrims for a less sum than 4000*l.*, which was the amount of the passage money to be paid to the owners of the wrecked vessel for carrying the pilgrims from Sumatra to Jedda. Ultimately the master of the wrecked vessel signed an agreement to pay 4000*l.* to the master of the plaintiffs' vessel to take the pilgrims to Jedda, and the pilgrims were taken in the plaintiffs' vessel to Jedda in safety. In an action to enforce the agreement:—

Held, that the agreement must be set aside as inequitable, and the Court awarded 1800*l.* as salvage remuneration.

Affd in part 2 PD. 5.

THIS was an action brought by the owners of the steamship *Timor* against the Singapore Steamship Company in the Exchequer Division of the High Court of Justice, but transferred to this Division. No statement of claim was delivered in the action, but the indorsement on the writ was in substance as follows:—

The plaintiffs claim 4000*l.*, due from the defendants under an agreement dated the 1st of October, 1875, between the master of the plaintiffs' ship *Timor*, for and on behalf of the plaintiffs, and the master of the defendants' ship *Medina*, for and on behalf of the defendants, for the conveyance of passengers by the plaintiffs' ship *Timor* from Parkin Rock to Harnish Island, Jedda, with interest at 5*l.* per cent. per annum until payment.

The defendants in their statement of defence alleged in substance as follows:—

1. On the 30th of September, 1875, the *Medina*, while on a voyage from Singapore to Jedda with a general cargo, and having on board 550 passengers (pilgrims) who had embarked at Padang for Jedda, was wrecked on the Parkin Rock in the Red Sea, and the pilgrims were landed by the *Medina's* boats on the rocks.

2. The Parkin Rock is a small sharp rock about thirty miles from the main

land, and about 240 miles from Aden, and from two to three days' voyage from Jedda.

3. The *Medina's* boats were so knocked about in landing the pilgrims on the rock as to be useless, and the lives of the pilgrims, for whom there was scarcely standing room on the rock, were exposed to danger.

4. About 10 a.m. on the 1st of October, the master of the *Medina* observed a steamer, which proved to be the *Timor*, bound on a voyage from Kurrachee to Liverpool, and made signals of distress which were observed by the *Timor*, and she altered her course and bore down to the rock.

5. When the *Timor* approached the rock the master of the *Medina* went on board of her and told the master of the *Timor* the position of the pilgrims and asked him to render assistance.

6. Thereupon negotiations took place between the master of the *Timor* and the master of the *Medina*, the master of the *Timor* refused to take the pilgrims from the rock to Jedda for less than 4000*l.*, and the master of the *Medina*, who offered 1500*l.* and subsequently 2000*l.* to the master of the *Timor* for his services, and, after these offers had been refused, proposed to refer the amount to arbitration, which proposal was rejected, was ultimately forced to acquiesce in the demand of the master of the *Timor*, and to sign the agreement sued on. The *Medina* was totally lost on the said rock.

7. The said sum of 4000*l.* was not a reasonable amount for the services to be rendered by the *Timor*, but was an exorbitantly excessive amount for such services, and the master of the Timor in procuring the master of the *Medina* to sign the said agreement took undue advantage of the position in which the master of the *Medina* and the pilgrims were placed; and the defendants further say that the master of the *Medina* had not any authority to enter into the said agreement on behalf of the defendants, and that the said agreement was extorted and improperly obtained from the master of the *Medina* and is wholly unjust and inequitable and is not binding upon the defendants.

8. The defendants are ready and willing to pay to the plaintiffs such reasonable amount for their services as the Court may think just.

The plaintiffs delivered a reply admitting the first five paragraphs of the statements of defence, but joining issue upon the 6th and 7th paragraphs, except the averments that negotiations took place between the master of the *Medina* and the master of the *Timor*, and that the latter refused to take the pilgrims from the rock to Jedda for less than 4000*l.*, and submitting that the agreement of the 1st of October, 1875, was a valid and subsisting agreement binding upon the defendants.

The master of the *Timor* and the master of the *Medina* were examined orally before examiners of the Court. The result of their evidence appears from the judgment. During the examination of the master of the *Timor* the agreement signed by the

1876

THE MEDINA.

master of the *Medina* was put in. This agreement was substantially as follows:—

"Agreement made this 1st of Oct., between Captain Brown of the *Timor*, of London, and Captain Black, of the steamer *Medina*, belonging to the Singapore Steamship Company, Limited, that the said Captain Brown agrees with Captain Black, of the *Medina*, to take the whole of his passengers (pilgrims) from off the Parkin Rock and take them to the Port of Jedda, or as near thereto as she can safely get, for the lump sum of 4000*l.* sterling.

The *Admiralty Advocate* (*Dr. Deane, Q.C.*), and *Myburgh*, for the plaintiffs. The services here did not alone consist of rescuing the lives of this large number of pilgrims from imminent danger, but there was in fact a trans-shipment of the pilgrims, in return for payment of freight, whereby the owners of the *Medina* were enabled to fulfil the contract they had made for the conveyance of the pilgrims to Jedda. Not only did the master of the *Timor* take upon himself the risk of entering that port—the most dangerous port in the Red Sea, but if any of the pilgrims had fallen sick on the voyage to Jedda, or for any other reason quarantine had been imposed at Jedda, the master of the *Timor* would have incurred great expense. Considering the class to which such pilgrims usually belong, the breaking out of sickness among them cannot be regarded as an improbable event. In determining whether the agreement was an inequitable agreement it cannot be material that, as it actually turned out, the weather remained calm during the service and that no delay through quarantine occurred to the *Timor* at Jedda: *The Enchantress.* (1) The agreement can clearly be supported on the principles recognised in the case of *The Waverley.* (2)

Wood Hill (*Cohen, Q.C.*, with him), for the defendants. The agreement must be set aside as exorbitant: *The Theodore.* (3) Indeed, when the circumstances of the case are considered, it becomes evident that the demand made by the master of the *Timor*, was scarcely consistent with any fair or just dealing. Moreover,

(1) Lush. Adm. 93. (2) Law Rep. 3 A. & E. 369.
(3) Swa. Adm. 351.

the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 458, enacts that the amount of salvage remuneration to be paid by the owners of a vessel in respect of life salvage, shall be a reasonable amount, but the amount asked here is clearly unreasonable. The services were rendered without difficulty or danger, and the *Timor* obtained a clean bill of health at Jedda. [He also referred to *The Cargo Ex Woosung.* (1)]

SIR ROBERT PHILLIMORE. The circumstances of this case are very singular; but it is one in which the Court really feels no doubt as to the judgment which it ought to give. It is not necessary that I should go into an examination of the authorities which I recently referred to in the case of *The Cargo Ex Woosung* (1), and which I also referred to in the case of *The Waverley.* (2) But I may state the result of them to be this, that it is the practice of this Court, partly for the protection of absent owners and partly on the grounds of general policy, to control agreements made by masters when an examination of those agreements shews that they are clearly inequitable. In the present case there were upwards of five hundred pilgrims on a rock which is just six feet above water. Their ship had gone to pieces, and the plaintiffs' vessel, the *Timor*, came up close without any difficulty or danger at all; because the evidence is that the water was quite deep up to the rock; she came up and her captain, in effect, says, I will not relieve you from this situation, which a few hours of bad weather might convert into one of most imminent danger, indeed into your total destruction. I will not take you away unless you give me 4000*l.* Now, what is 4000*l.* with regard to the matter saved, which is human life? On the other hand, however, 4000*l.* is the whole sum that was to be paid for conveying the pilgrims to Jedda, and in my opinion if the master of the *Timor* had not taken these pilgrims off the rock in the circumstances stated, and bad weather had come on, and they had lost their lives in consequence, he would hardly have been in a better position than a pirate. Nevertheless, it was certainly a valuable salvage service according to the principles upon which such services have always

(1) Ante, p. 260. (2) Law Rep. 3 A. & E. 369.

1876

THE MEDINA.

been considered in this Court, but I am of opinion that 4000*l.* is a great deal too much, and I shall award 1800*l.* As to the costs there has been no tender, and I shall leave each party to pay their own costs. If there had been a sufficient tender, I should have given the defendants their costs. I shall not give costs on either side.

Solicitors for plaintiffs: *Brooks, Jenkins, & Co.*
Solicitors for defendants: *Dawes & Sons.*

May 16.

[IN THE COURT OF APPEAL.]

THE CITY OF BROOKLYN. (O. 147.)

Collision—Speed—Ship astern—Light.

In a case of collision a steamer will be held not justified in running at full speed on a dark night and not far from a coast where other vessels are likely to be.

A vessel, unless there be apparent danger, is not guilty of negligence in not shewing a light to a vessel following her.

THIS was an action brought by the owners of the Italian barque *I. Mille,* of 376 tons register, against the owners of the Inman steamer *City of Brooklyn,* 1978 tons register, for damage done in a collision.

About 4 a.m., on the 7th of January, 1876, the barque was about thirty-five miles from the Old Head of Kinsale, bound for Queenstown, and heading N.E. by E., wind light. The steamer was coming from New York to Liverpool by Queenstown, at ten and a half knots an hour, and was astern of the barque. The green and white lights of the steamer were seen by those on board the barque for about a quarter of an hour before the collision, and according to their evidence they thought that the steamer would keep out of the way, and they did not apprehend danger until she was less than one-third of a mile off. The captain of the barque then ordered the bell to be rung, and a lamp to be lighted and shewn. The bell was rung, but some delay took place in lighting the lamp, and before it was done the collision took place. The barque went down soon afterwards, and three of the crew were lost. In the

statement of claim it was alleged that a good look-out was not kept on board the steamer; and that she improperly neglected to take in due time proper measures for keeping out of the way of the barque.

The case of the steamer was, that in the position of the vessels she could not see any light on board the barque, and owing to the darkness of the night, those on board the steamer, though they kept a good look-out, were unable to discover the barque until at a distance of one or two lengths, when her red light was seen; the engines were immediately stopped and reversed, and the helm was starboarded; that those on board the barque acted negligently and improperly by omitting to shew a light, or otherwise to take proper measures to warn those on board the steamer of the position of the barque.

The action was tried before the judge of the Admiralty Division, assisted by two of the elder brethren of the Trinity House, and a decree was made for the damage. (1)

(1) 1876. Feb. 19. SIR ROBERT PHILLIMORE said that there was no dispute that the steamer was the overtaking vessel, and the barque was the vessel ahead, so that the 17th Art. of the steering and sailing rules applied. The evidence shewed that the barque kept her course, and that at the time when she was descried by the steamer no manœuvre on the part of the steamer could have prevented a collision. As to the plea of inevitable accident, his Lordship and the elder brethren were satisfied that the accident could not properly be described as inevitable. The elder brethren were further of opinion that, in such a state of weather as was proved in this case, the barque ought to have been seen at such a distance as would have enabled the steamer to get out of the way. His Lordship would not, however, leave the case solely on that issue. Even assuming that it might be the duty of the barque to do some act to indicate her presence, the elder brethren consider that the barque was, up to the last moment, justified in thinking that the steamer would pass to leeward.

On the same assumption, the next question was, how far the speed of the steamer was proper under the circumstances. Now, she was not far from the Irish coast, where vessels were sure to be met with, and she was going at full speed on a night which her own witnesses described as so dark that she could not see another vessel until almost alongside her. His Lordship was of opinion that such speed, under the circumstances, was improper.

The duty of a vessel ahead to make any signal, by way of a light, to a vessel overtaking her, had been very much discussed in the two cases of *The Earl Spencer* (33 L. T. (N.S.) 235), and *The Anglo-Indian* (33 L. T. (N.S.) 233). In the latter case their Lordships, in delivering the judgment of the Privy Council, say this: "We are very far from saying that it is never the duty of the vessel ahead to look behind. There

1876

THE CITY OF BROOKLYN.

The defendants appealed, and the appeal was heard by James, L.J., Baggallay, J.A., Lush, J., and two nautical assessors.

Butt, Q.C., E. C. Clarkson, and *Myburgh,* for the defendants. The steamer was not wrong in proceeding at full speed on a clear night; but even admitting that she was not right in doing so, there was contributory negligence on board the barque. She ought to have shewn a light or made some signal, as she could see the steamer, and might have guessed that the steamer could not see her. *The Earl Spencer* (1) and *The Anglo-Indian* (2) are authorities on the subject. No doubt the rules are silent as to this case, but there is nothing in the order to exclude ordinary care and precaution: *The Olivia* (3); *The John Fenwick* (4); *The Saxonia.* (5)

Milward, Q.C., and *G. Bruce,* for the *I. Mille,* were not called upon.

JAMES, L.J. I am of opinion that we cannot come to any conclusion different from that to which the learned judge of the court below has come, that conclusion being in accordance with the opinion of the nautical assessors upon this matter, which is to a great extent a matter of nautical skill and science. The learned

---

may undoubtedly be circumstances of an exceptional character, which may throw upon the vessel ahead the duty of looking behind, and, further, of giving some signal, by the way of a light, or otherwise, to a vessel behind, approaching her under circumstances under which there is reason to suppose that the after vessel does not see the vessel in front, and when there is danger of collision." So far as the statutory regulations are concerned, there was no law binding on the vessel ahead to exhibit a light astern, and if it had been the intention of the legislature that she should be under that obligation, there were several rules in which one naturally would expect to find that obligation expressed, and where it was not so expressed.

But his Lordship was of opinion, and the elder brethren agreed with him, that in this case there were no exceptional circumstances to compel the barque to exhibit a stern light, at least, not until the time when she did attempt to do so.

Looking into all the circumstances of this case, his Lordship was of opinion that the steamer was alone to blame for this collision, and decreed accordingly.

(1) 33 L. T. (N. S.) 235; 3 Asp. Mar. L. C. 4.

(2) 33 L. T. (N. S.) 233; 3 Asp. Mar. L. C. 1.

(3) Lush. Adm. 497.

(4) Law Rep. 3 A. & E. 500.

(5) Lush. Adm. 410.

judge was of opinion that the ship complained of was going at a speed not to be justified, having regard to the state of the night, the position of the coast, and the probability of there being other vessels in the way; and I am bound to say that however convenient it may be for commerce and for travellers—however convenient it may be to be able to go to America at eleven or twelve miles an hour, that is still a speed at which it does not seem to us to be reasonable for a steamer like this to go when not far from the coast, and on a night so dark that, according to the evidence of their own witnesses, they could not see another vessel more than a length of a ship away. It is said, on behalf of the steamer, that if the other ship did see the steamer she ought to have shewn a light. Of course we cannot suppose that any captain would wantonly neglect to take the necessary precautions to save his own life and the lives of his men, therefore we must suppose that he formed the best judgment he could, and did everything that would tend to avoid a collision. Then when he saw the danger, he did, apparently, what he could; he ordered the bell to be rung and a light to be got, but it was too late. I am of opinion, therefore, that whatever may have occurred in other cases, where it was held to be the duty of a ship to warn another of the risk that she was running, there were in this case no such circumstances as to shew any neglect of duty upon the part of the crew of the Italian ship, or that they did anything to justify our charging them with contributory negligence.

I am, upon the whole, of the same opinion as the Court below.

BAGGALLAY, J.A. I am of the same opinion.

LUSH, J. I am also of the same opinion. I think the rule of law with regard to travelling at sea is identical with the law of travelling on the high road. No one on a dark night has a right to go at such a rate of speed as not to be able to escape an accident if he happens to follow immediately in the wake of another, whether it be by sea or by land. I think that the rate of speed was an unjustifiable rate for that vessel to run at on such a dark night, when she could not discern another vessel until within her own length of that vessel. As to contributory negligence, I do not think there is any necessity for a ship ahead to look out for ships that are behind her unless the danger is apparent. It is only

1876

THE CITY OF BROOKLYN.

when there is an apparent danger that the necessity arises to do the best they can for their own safety. Here the persons on board the first ship did so, but when it was too late.

Appeal dismissed with costs.

Solicitor for the *I. Mille: T. Cooper.*

Solicitors for defendants: *Gregory & Co., for Duncan, Hill, & Dickinson, Liverpool.*

April 12.

[IN THE COURT OF APPEAL.]

THE VICTORIA.

Appeal—Security for Costs—Order LVIII., Rule 15.

The Court of Appeal refused to direct a defendant who had appealed from a judgment of the Admiralty Division, although his ship had been arrested and released on bail, and although he had obtained a stay of execution pending the appeal, to give security for the costs of the appeal.

THE plaintiff in this case had arrested a ship, which was released on the usual bond, given in September, 1875. The plaintiff proceeded and obtained a decree for payment of a sum due to him for wages and disbursements. The defendants appealed. They then obtained from the judge of the Admiralty Division an order staying execution pending the appeal: see Order LVIII., Rule 16.

The plaintiff applied that the defendants might give security for the costs of the appeal: see Order LVIII., Rule 15.

Maclachlan, for the plaintiff. This is an action in rem, and if the plaintiff had been allowed to retain the ship, he would have had security for his costs; but the Court has deprived him of that security, and has compelled him to accept in its stead a bail-bond, which does not include the costs of an appeal. In other appeals a deposit has to be made. The bond here was given before the Judicature Acts came into operation, and the plaintiff's right is recognized by 24 Vict. c. 10, s. 33. Unfortunately the form of bond under that Act has never been issued: *The Helene* (1); but the practice is stated in Macpherson, Pr. P. C., p. 156, ed. 1860.

(1) Br. & L. Adm. 425.

E. C. Clarkson, for the defendants.

1876

THE VICTORIA.

THE COURT (James, L.J., Mellish, L.J., and Baggallay, J.A.) said that that could not be understood to be the general practice, but could only have arisen under special circumstances, of which none were shewn here. No case of such a bond had been produced, and the practice of the Privy Council seemed settled that, except under special circumstances, security for the costs of an appeal was not required. The same practice would be followed, and the application must be refused with costs.

Application refused.

Solicitors for plaintiff: *Parker & Clarke.*
Solicitor for defendants: *H. Aird.*

THE SISTERS. (7217.)

May 30.

Limitation of Liability—Practice.

A vessel which had been arrested in a cause of damage was released on payment into Court of the amount to which the liability of her owners was limited by statute, together with a sum to cover interest and costs. Subsequently the vessel was pronounced solely to blame for the collision, and her owners, who had instituted a cause of limitation of liability, moved the Court to decree for a limitation of their liability, and to order that the sum in Court should be transferred to the credit of the limitation of liability suit.

The Court decreed a limitation of liability, but considered it unnecessary to order that the amount in Court should be transferred to the credit of the limitation of liability suit.

THIS was a cause of limitation of liability, instituted on behalf of the owners of the sailing barge *Sisters*, against the owners of the sailing barge *Alfreda*, the owners of her cargo, and against every person having any claim with reference to the collisions hereinafter mentioned.

On the 15th of October, 1874, the *Sisters*, in company with the barges *Alfreda* and *Volunteer*, was at the entrance of Halfway Reach, in the River Thames, when the steamship *Thames* came into collision with the *Sisters*, the *Alfreda*, and the *Volunteer*; and the *Alfreda* and the *Volunteer* sank, with cargo and effects on board of them; and by reason of the said collision with the *Alfreda* the

1876

THE SISTERS.

master of the *Alfreda* and his wife, who were at the time on board the *Alfreda*, were drowned.

On the 2nd of February, 1875, the owners of the *Alfreda* instituted a cause of damage (No. 7186), in the High Court of Admiralty, against the *Sisters*, to recover for the damage their vessel had sustained. The *Sisters* was arrested in the suit, and an appearance having been given for her owners as defendants, the Court on the 2nd of March, 1875, after hearing counsel on behalf of the plaintiffs and defendants, decreed the *Sisters* to be released on payment into Court of the sum of 960*l.* 7*s.*, that sum being the aggregate amount of 15*l.* per ton for each ton of the registered tonnage of the vessel, together with the sum of 325*l.* 8*s.* to cover interest and costs. On payment of such total sum into Court the *Sisters* was released from arrest. Subsequently, on the cause of damage coming on for hearing, the *Sisters* was pronounced solely to blame, and on appeal the decision was upheld by the Court of Appeal. (1)

May 30. The cause of limitation of liability, the date of the institution of which was the 22nd of February, 1875, came on for hearing.

F. W. Raikes, on behalf of the plaintiffs, moved the Court to decree for the limitation of the plaintiffs' liability to an aggregate amount of 15*l.* per ton for each ton of the tonnage of the *Sisters*, and to the costs incurred in the said suit, and in the suit of limitation of liability, and to order that all further proceedings in the said suit (No. 7186) be stayed, and that the said sum paid into Court in the said suit be transferred to the credit of the suit of limitation of liability.

E. C. Clarkson, on behalf of the defendants, asked that the defendants' costs in the limitation of liability suit, which had not yet been taxed, should be secured.

SIR ROBERT PHILLIMORE, having consulted with the registrar as to the practice, granted a decree of limitation of liability as prayed, on the plaintiffs' solicitors undertaking that the costs in the limitation of liability suit should be paid, and ordered the further proceedings in the damage suit to be restrained, but made no order as

(1) Ante, p. 117.

to that portion of the plaintiffs' motion which prayed that the sum paid into Court in the damage suit should be transferred to the credit of the limitation of liability suit.

Solicitors for plaintiffs: *Deacon, Son, & Rogers.*
Solicitors for defendants: *Ingledew, Ince, & Greening.*

[IN THE COURT OF APPEAL.]

May 29.

THE GLANNIBANTA. (O. 158.)

Appeal—Reversal—Evidence—Collision—Look-out—Negligence.

Where the judge of the Court below has come to a conclusion of fact after hearing witnesses, the Court of Appeal will not, except in cases of extreme pressure, reverse his decision; but where the decision of the Court below does not depend upon the credibility of the witnesses, but on the inferences from the evidence drawn by the judge, his decision may, even without such pressure, be reversed by the Court of Appeal.

A steamer, with sails up, running through a roadstead ought even by day-time and in fine weather to have a man on the look-out besides the captain on the bridge.

THIS was an action for damages by the owners of the steamship *Glannibanta,* against the owners of the steamship *Transit,* for damages incurred in a collision; and there was a counterclaim by the owners of the *Transit.*

The action was heard before Sir Robert Phillimore, judge of the Admiralty Division, assisted by two Elder Brethren of the Trinity House; and the judge, after hearing witnesses on both sides, came to the conclusion that the *Transit* was in fault, and decreed judgment accordingly. The owners of the *Transit* appealed.

The facts of the case are stated in the following judgment.

May 17 and 18. *Benjamin, Q.C.,* and *Phillimore,* for the *Transit,* as to keeping a look-out, cited *The Iona.* (1)

Milward, Q.C., Butt, Q.C., and *Clarkson,* for the *Glannibanta.*

Cur. adv. vult.

May 29. The judgment of the Court (James, L.J., Baggallay,

(1) Law Rep. 1 P. C. 426.

1876

THE GLANNIBANTA.

J.A., and Lush, J., assisted by two nautical assessors) was delivered by

BAGGALLAY, J.A. On the 23rd of January, 1876, about 1 p.m., two iron screw-steamships, the *Glannibanta* and the *Transit*, came into collision in Yarmouth Roads, and both vessels sustained considerable damage. The weather was fine and clear, the wind in the S.W., blowing a light breeze, with no sea, and the tide on the last quarter ebb, running to the northward. It does not appear that the roadstead was unusually crowded with vessels, and it is difficult to imagine a state of circumstances under which with the use of reasonable precautions a collision was less likely to occur.

On the 25th of January an action for damages in respect of this collision was commenced in the Admiralty Division of the High Court of Justice, by the owners of the *Glannibanta*, against the owners of the *Transit*, and was met by a counter-claim for damages on the part of the latter.

The action came on for hearing before the judge of the Admiralty Division on the 20th and 21st of March. On the latter day the learned judge decided that the *Transit* was alone to blame, and made the usual order for assessing the damage sustained by the *Glannibanta*, and from that decision the present appeal is brought.

The *Glannibanta* was a vessel of 534 tons register, and was proceeding from London to the Tyne in ballast; the *Transit* was of 345 tons register, and was on a voyage from Grimsby to Dieppe with a general cargo. Shortly before the collision, the *Glannibanta* had come through Hewitt's Channel, and had passed the St. Nicholas light-ship on her course northwards, and the *Transit* had passed the Bell Buoy on her course southwards; the collision took place between the South Elbow and south-west Scroby Buoys, at a distance from the Scroby Sands of from a quarter to half a mile.

The plaintiffs allege that, immediately after passing the St. Nicholas light-ship, the *Glannibanta*, which had previously been steering N. by W., ported her helm so as to change her course to N. ½ E., and proceeded down the roads at the rate of about nine knots an hour; that shortly before 1 p.m. those on board her saw the *Transit* approaching, bearing about two points on the port

bow, and at the distance of from a half to three quarters of a mile; that the helm of the *Glannibanta* was again slightly ported, and she was kept on her course with the intention of passing the *Transit*, port side to port side, but that the *Transit*, instead of passing the *Glannibanta* on her port side, suddenly, and with the apparent intention of crossing the bows of the *Glannibanta*, starboarded her helm, and, although the engines of the *Glannibanta* were immediately stopped and reversed, and her helm was starboarded, the starboard side of the *Transit*, abreast of her foremast, came into contact with the stem of the *Glannibanta*.

The defendants, on the other hand, allege that when the *Transit* first observed the *Glannibanta*, the latter was about a mile ahead, that the *Transit* was then heading about S. by W., well over to the east side of the roads, and proceeding at the rate of about eight knots an hour, that the *Glannibanta* was not then approaching so as to pass port side to port side, but was continuing on her N. by W. course, by which she had passed the light ship, and was apparently heading to the town of Yarmouth, and communicating with the shore by signals; that the *Transit*, in this belief, and expecting the *Glannibanta* to pass starboard to starboard, starboarded about two points; but the *Glannibanta* suddenly ported, then, for the first time, straightening down the roads, and the vessels were almost immediately in collision, notwithstanding the stoppage and reversal of the engines of the *Transit*. The defendants further allege that there was no proper or sufficient look-out on board the *Glannibanta*, and that when she so ported, those on board her were not aware that the *Transit* was so close to them, and only discovered the fact after they had ported, and when the collision was inevitable.

It is not immaterial to note that, having regard to the speed at which the two vessels were proceeding, they were nearing each other at the rate of about a mile in three minutes to three minutes and a half.

Now, the substantial question which had to be decided in the Court of the Admiralty Division, and which has to be decided by us in the present appeal, is as to the time at which the *Glannibanta* straightened her course from N. by W. to N. ½ E.—whether she did so at the time of, or immediately after, passing the St.

1876

THE GLANNIBANTA.

Nicholas light-ship, as alleged by the plaintiffs, or whether, as alleged by the defendants, she continued on her N. by W. course for some half a mile or three quarters of a mile after she had passed the light-ship, and then, and not till then, straightened her course. If the former be the correct view of the case, it is clear, upon the evidence, that the *Transit* was in error in starboarding when she did; and if the latter is the correct view, it is equally clear, upon the evidence, that the *Glannibanta* ought not to have ported when in such close proximity to the *Transit.*

This question was decided by the learned judge of the Admiralty Division in accordance with the plaintiff's contention, and he appears to have been much influenced in arriving at this conclusion by the course taken by another steamer, the *Paradox,* which was at the same time proceeding to the north, and by the evidence given by persons who were on board the *Paradox* respecting the movements of the *Glannibanta* and the *Transit.* The *Paradox* had passed the St. Nicholas light-ship somewhat in advance of the *Glannibanta,* and had changed her course on passing the light-ship from N. by W. to N. ½ E. so as to straighten down the roads, and on meeting the *Transit* had passed her port side to port side. From this the learned judge very justly inferred that the course so made by the *Paradox* was the natural and proper course for any other ship similarly circumstanced, and having stated that in his opinion the natural course for the *Glannibanta* was to have ported immediately on passing the light-ship, he proceeded to refer to the argument which had been addressed to him on the part of the defendants, and which was the same in substance as has been addressed to us here, in the following terms: "The porting on passing the light-ship is not denied to have been her natural course; but it has been contended, and with very great power, that her fault was this, that she went towards Yarmouth further than was necessary or proper, and thereby brought her starboard side open to the *Transit,* who, on seeing the starboard side, was justified in starboarding."

To this argument, and the evidence upon the subject of it, the learned judge next addressed himself, and having stated that in the conflict of evidence he and the Elder Brethren of the Trinity House were of opinion that they might safely rely upon the testi-

mony of those who had been on board the *Paradox*, he acted upon the evidence of those witnesses, and considering it to be thereby established that the *Glannibanta* had followed in the wake of the *Paradox*, he held that the *Transit* had starboarded when the *Glannibanta* was on her port bow, and had thus caused the collision, for which she was alone to blame.

If this view be correct, it of course negatives the contention of the defendants that the *Glannibanta* continued on her course of N. by W. for some distance after she had passed the lightship. In the course of the argument on behalf of the plaintiffs we were much pressed with the language from time to time made use of by the Judicial Committee of the Privy Council in Admiralty cases, and particularly in the cases of *The Julia* (1) and *The Alice* (2), to the effect that if in the Court of Admiralty there was conflicting evidence, and the judge of that Court, having had the opportunity of seeing the witnesses and observing their demeanour, had come, on the balance of testimony, to a clear and decisive conclusion, the Judicial Committee would not be disposed to reverse such decision, except in cases of extreme and overwhelming pressure; and it was urged upon us that in the present case there was no such extreme and overwhelming pressure as should induce us to reverse the decision of the Admiralty Division as to the question of fact upon which its decision was based.

Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witneses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on question of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.

(1) 14 Moo. P. C. 210. (2) Law Rep. 2 P. C. 245.

1876

THE GLANNIBANTA.

In the present case it does not appear from the judgment, nor is there any reason to suppose, that the learned judge at all proceeded upon the manner or demeanour of the witnesses; on the contrary, it would appear that his judgment in fact proceeded upon the inferences which he drew from the evidence before him, and which we have really the same means of considering that he had, and with this further advantage, that we have had his view of the inferences to be drawn from the evidence as well as the evidence itself made the subject of elaborate and able discussion on both sides.

Having given our best consideration to the evidence in this case, we are unable to arrive at the same conclusion as that arrived at by the learned judge of the Admiralty Division. It is quite true, as has been already stated, that the evidence of the captain and helmsman of the *Paradox* is to the effect that, in their opinion, the *Glannibanta* ported her helm immediately after she had passed the light-ship, and that such evidence is in accordance with the statements of the captain and helmsman of the *Glannibanta,* but it is in our opinion clear, from the circumstances to which we are about to advert, and to which the attention of the judge of the Admiralty Division does not appear to have been directed, that these witnesses must have been mistaken. The captain of the *Glannibanta* himself most distinctly states that he saw the *Transit* directly after he ported, and that she was then about half a mile or a little more from the *Glannibanta,* and this is supported by other persons who were on board the *Glannibanta.* Now, there is no dispute that the point at which the collision took place was upwards of a mile to the north of the light-ship, though there is some slight difference of opinion as to the distance from Scroby Sands, and as the two vessels were approaching each other at about equal rates, the *Transit* must at the time when the *Glannibanta* passed the light-ship have been at least a mile to the north of the point of collision and at least two miles from the *Glannibanta,* and had the *Glannibanta* ported her helm immediately on passing the light-ship, the *Transit,* when first seen from the *Glannibanta,* must have been at least two miles distant instead of half a mile or three quarters of a mile, which most of the

witnesses, except those who were on board the *Paradox*, agree in treating as about the distance between the two ships when the *Glannibanta* straightened her course.

If, however, as is contended by the defendants, the *Glannibanta* did not port her helm until she had left the lightship more than half a mile behind her, she would have been when she ported about half a mile to three quarters of a mile from the *Transit*, each being about a quarter of a mile from the eventual point of collision.

Under these circumstances, having given our best consideration to all the evidence in the case, and having had the benefit of the advice of the nautical assessors, by whom we have been assisted on the present occasion, we have arrived at the following conclusions, in which they entirely concur:—

1. That the *Glannibanta* continued on her course for more than half a mile after she had passed the lightship, whether or not she did so for the purpose of interchanging signals with Yarmouth, as suggested by the defendants, it is immaterial for us to consider. The fact is proved to demonstration by the evidence of the captain of the *Glannibanta*, and it follows from this,

2. That by keeping on this course she led those on board the *Transit* to believe, and that they were justified in believing, that she was making for Yarmouth and would pass them starboard to starboard.

3. That, having regard to these circumstances, the *Transit* was fully justified in starboarding when the *Glannibanta* was first seen from her deck, and that the *Glannibanta* was not justified in porting when in such close proximity to the *Transit*.

4. That the collision was occasioned by such improper porting of the *Glannibanta*, it being practically impossible to avoid a collision after the course of the *Glannibanta* had been changed.

In arriving at these conclusions we are doubtless dissenting from the views expressed by the captain and helmsman of the *Paradox*, upon which the judge of the Admiralty Division relied, but we can well understand how in such a case persons desiring to speak with the most perfect honesty and accuracy may have been mistaken. There was nothing in the surrounding circumstances

1876

THE GLANNIBANTA.

prior to the collision to direct the attention of the people on board the *Paradox* to the movements of the *Transit* and the *Glannibanta*, so as to induce them to watch such movements with any particular nicety, and the want of accuracy in such casual notices as were taken is exemplified by the circumstance that the captain of the *Paradox* states that the *Glannibanta*, after she had straightened her course, was a quarter of a mile astern of him, whilst his helmsman makes the distance 200 yards only, and the captain of the *Glannibanta* says he was as much as half a mile or nearly so astern.

We cannot part with this case without expressing our surprise that there should have been no proper or sufficient look-out on board the *Glannibanta*, for had there been a proper look-out, and the *Transit* had been seen from the *Glannibanta*, as in such case she must have been before the latter ported, we cannot for a moment suppose that that change of course would have been made. The captain of the *Glannibanta*, in his examination, stated that it was not a customary thing to keep a man on the look-out in the day-time on board ships belonging to his owners; and, on the occasion in question, until after she had ported, the captain was the only person on the look-out, and he was on the bridge, with his view forward limited by reason of the sails on his own ship to four points on his starboard bow. A very different course was pursued by the *Transit*, on board of which an efficient look-out was kept by her captain and mate on the bridge, and by a seaman well forward in the bows.

We have only further to remark that, having regard to the fact that the *Transit* had a proper and sufficient look-out in every direction, the course pursued by her of starboarding when she first saw the *Glannibanta* would be quite inexplicable if the vessels had been approaching each other port side to port side, as contended for by the plaintiffs. It appears to us impossible to adopt the suggested explanation of the plaintiffs that by crossing the bows of the *Glannibanta* the *Transit* might save a little distance in her course to the south, and that that was her object in starboarding. On the other hand, we can well understand that the *Glannibanta*, having no sufficient look-out, ported her helm in

ignorance of the position of the *Transit*, and simply with the view of straightening her course down the roads.

The *Transit* was, in our opinion, very carefully and cautiously handled. The *Glannibanta* was carelessly and recklessly managed in changing her course in ignorance of the position of another vessel, which was only half a mile off. It is possible, no doubt, that the careful ship may have blunderingly gone wrong, and that the careless ship may by accident have gone right, but the burthen of proof on the latter is then very heavy, and the *Glannibanta* has certainly not discharged it in this case.

It may be well to add that, having regard to the position of the *Glannibanta* and *Paradox* in passing the lightship, and their position when the *Glannibanta* sighted the *Transit*, the *Glannibanta*, the faster ship, must have lost, instead of gaining, ground, which can only be accounted for by the one having taken a straight and the other a devious course.

Upon the whole, we are of opinion that the *Glannibanta* was alone to blame, and that consequently the appeal must be allowed, the order of the Court below discharged, and the usual order of reference made for assessing the damage sustained by the *Transit*.

The costs both in the Court below and of the appeal must follow the result.

Judgment reversed.

Solicitors for the *Transit*: *Pritchard & Sons.*

Solicitors for the *Glannibanta*: *Stokes, Saunders, & Co.*

1876
April 4.

THE LIMERICK. (7318.)

Wages and Disbursements—Bond given by Master in respect of a Collision admittedly occasioned by Negligence of Master—Liability of Master for Necessaries.

8 PD 51.

A sailing vessel lying at anchor in a foreign river was run into and damaged by an English steamship, which was at the time under charter to proceed to a neighbouring port for a perishable cargo. The master of the steamship, acting in the interests of his owners and in order to prevent the arrest and detention of his vessel at the port where the collision occurred, executed a bond acknowledging the liability of his vessel, and binding himself and his owners for the payment to the owners of the vessel run into of the damage their vessel had sustained.

In an action of wages and disbursements brought by the master against his vessel he claimed to recover, as a disbursement for which he was liable, the amount of the penalty of the bond:—

Held, that the amount of the penalty of the bond must be retained in Court out of the proceeds of the vessel, to answer any claim which might be established against the master under the bond.

THIS was a cause of wages and disbursements carried on on behalf of the master of the steamship *Limerick* against the said vessel, and against C. J. Jutson, an alleged mortagee of the vessel, intervening as defendant.

The plaintiff claimed to recover in the action, inter alia: 1. A sum of 200*l.*, being the amount of the penalty of a bond given by him in the circumstances hereinafter mentioned, in respect of a collision between the *Limerick* and a vessel called the *Skitty Belle*, which occurred in Huelva river, in the month of February, 1876; and, 2. A sum of 102*l.* 0*s.* 2*d.*, alleged to be due to Messrs. Dowson & Worth, shipbrokers, on account of necessaries supplied to the *Limerick*.

On the 14th of July, 1875, the claim of the plaintiff was pronounced for with costs, and was referred to the registrar, assisted by merchants, to report thereon.

In the claim of the plaintiff filed in the registry the above-mentioned sums of 200*l.* and 102*l.* 0*s.* 2*d.* were set forth as disbursements, and in an affidavit made by the plaintiff he deposed, in the 20th and 22nd paragraphs thereof, as follows:—

20. In the month of February, 1875, the *Limerick* came into collision with the schooner *Skitty Belle* in Huelva river owing to the strength of the tide, and as the *Skitty Belle* was at anchor it was clear that the *Limerick* was to blame.

I paid to the master of the *Skitty Belle* the sum of 40*l.* on account of his damages, and the *Limerick* was allowed to leave Huelva on my giving a bond on behalf of myself personally and the owners of the vessel for the sum of 200*l.* to cover such damages as might be ascertained. No claim has yet been made on me under the said bond, but I am personally liable should such claim be made. I am informed that the owners of the *Skitty Belle* are suing Mr. Jutson, one of the owners, for the same; but although I have no personal knowledge of the suit, I have reason to believe he is defending the said action on the ground that, although he is on the register as an owner, he was really only a mortgagee of the said vessel, and had no beneficial interest; and I am advised and believe that it is a very doubtful question whether he is liable or not under the circumstances, and, in the event of his not being so liable, in all probability I shall be called upon to pay the amount of the said bond, or so much as is due thereunder.

22. The amounts specified in my claim in this suit as due to Messrs. Dowson & Worth . . . . are justly due and owing from the said vessel, and, to the best of my knowledge and belief, I am personally liable for the said amounts.

The reference was commenced on the 13th of December, 1875, when the plaintiff was examined in support of his claim, and was continued on the 12th and 14th of February; further evidence on behalf of the plaintiff being taken on the former of the two last-mentioned days.

The following evidence material to this report was given by the plaintiff at the reference:—

The collision occurred at Huelva, owing to strength of tide, and yet I was wrong. My ship was unmanageable. I did all I could to prevent it. I paid under protest, and noted protest. If anybody on board my ship was wrong I was wrong. I did not communicate with any one in England before I gave the bond. There is a telegraph, but there was fruit waiting for me at Lisbon, and I had to go on for it. I came to the conclusion that the *Skitty Belle* was not to blame as soon as the accident had happened. It was about four in the afternoon. I went on shore three or four minutes after the accident. I think it happened on a Tuesday, and I executed the bond on the day after in the afternoon. I telegraphed to Mr. Ireland (1) to tell him of the collision either the day of or the day after the collision, and told him to wire me to Lisbon. I left Huelva the day but one after the collision. The ship lay there two days, but I had an expectation to get away on the following day but I could not finish my repairs soon enough.

Mr. Port took me and introduced me to Messrs. Dowson & Worth, telling them that the *Limerick* was not one of their ships, they only managed her. I can't account for the bill being made out only to the owners. I in the first place sent to Messrs. Dowson & Worth for their account. I didn't know whether I was liable or not, and wished to have all the accounts. I should say that that is the account they sent me. They didn't at the time make any demand on me. I didn't hear personally from them until two months ago. They have not sued me nor threatened me with a suit.

(1) One of the then owners of the vessel.

1876

THE LIMERICK.

I got an answer from Mr. Ireland to the effect that the *Limerick* was insured in a Collision Club. He had never blamed me for giving the bond. He told me to make up a statement of all that had been done and he would see to it then. I know Mr. Jutson. I have talked to him about it. He told me that I had no business to give the bond, and that he should oppose it. I told Mr. Jutson about the bond at Harwich. He came down there to look at the vessel about buying her in conjunction with another gentleman down there. Mr. Jutson said some one was suing him on the bond, and that he should oppose it. He told me because he was half owner on the register. But he told me he was not half owner, as he had sold out, but hadn't got the money, and he didn't know that he was liable. I gave the bond under the advice of the British Consul. Unless I did so the ship would have been arrested there.

The bond given by the plaintiff at Huelva was brought into the registry: omitting the immaterial portions, it was in terms as follows:—

"British Vice-Consulate, Huelva.

"Agreement between Mr. Sheriff Hopkins, master of the steamship *Limerick*, and of Liverpool, on behalf of the owners, underwriters, and all others concerned in the said vessel, and Mr. William Rees, master of the brigantine *Skitty Belle*, of Swansea, for and on behalf of the owners and all others concerned in the said brigantine.

"Mr. Sheriff Hopkins, acknowledging, as he does by these presents, the liability of the said steamship *Limerick* to the payment of the damages, losses, detentions, costs, and expenses sustained by the brigantine *Skitty Belle* in consequence of her being run into by the said steamship *Limerick* under his command, hereby binds himself, owners, underwriters, and all others concerned in the said vessel to the payment of the said damages, losses, detentions, costs, and expenses in the manner and with the conditions hereinafter stated."

[Here followed certain stipulations for the payment of the repairs of the *Skitty Belle*, occasioned by the collision, and of the compensation to be paid in respect of her detention while undergoing such repairs.]

"6. On signing these presents Mr. Sheriff Hopkins will be at liberty to proceed with the said steamship *Limerick* on her intended voyage without any further hindrance or detention on the part of the owners, master, or others concerned in the *Skitty Belle*.

"For the faithful performance of the foregoing agreement Mr.

Sheriff Hopkins binds himself, the owners of the steamship *Limerick*, and all others concerned, in the penal sum of 200*l.*, to be paid unto the owner and owners of the said brigantine *Skitty Belle*, his or their heirs, executors, administrators, or assigns.

"Thus done, signed, sealed, and executed at Huelva on this 6th day of April, 1875.

(Signed) "S. Hopkins.
"W. Rees.

"Before me (Signed) Edward Diaz,
"British Vice-Consul."

The following letter relating to the amount which the plaintiff claimed as a disbursement due from him to Messrs. Dowson & Worth was also brought in:—

"49, Lombard Street,
"13th March, 1876.

"Captain Hopkins,—Dear Sir,—We are sorry to have to trouble you again with regard to our account against the *Limerick*, but as Mr. Jutson denies his ownership and Mr. Ireland has failed, we must apply to you for payment. Our contract was made with you, and you are equally liable as master of the vessel.

"Yours faithfully,
"Dowson & Worth."

On the 16th of February the registrar made his report; the material portions of it were in terms as follows:—

Whereas in a cause of wages and disbursements which was instituted in the High Court of Admiralty of England on behalf of Sheriff Hopkins, master mariner, master of the vessel *Limerick*, the plaintiff, against the said vessel, and against C. J. Jutson, alleged to be a mortgagee of the said vessel, the defendant, intervening, the judge of the said Court did, by his decree of the 14th of July, 1875, pronounce in favour of the claim for wages and disbursements, together with costs, and did refer the said claim to the registrar, assisted by merchants, to report the amount thereof due thereon: and whereas the said cause is now pending in the Admiralty Division of the High Court of Justice,

Now I do most humbly report, &c., I find that there is due to the plaintiff the sum of 1048*l.* 19*s.* 7*d.*, with interest from the date of this report, as well as the costs of these proceedings. I am also of opinion that the plaintiff is entitled to the sum of 200*l.* retained in Court to answer any claim that may be established against him under the bond given by him in respect of the collision between the *Limerick* and the *Skitty Belle*. I am further of opinion that the plaintiff is entitled to payment of the amount found due to him out of the proceeds of sale

1876

THE LIMERICK.

of the vessel *Limerick* that may be now remaining in Court in priority to all other claims.

In the schedule annexed to the report were, inter alia, the following items:—

		Allowed.		
		£	s.	d.
50.	Bond for 200*l.* given by the master in respect of a collision between the *Limerick* and the *Skitty Belle*	200	0	0
54.	Dowson & Worth, Shipwrights . . .	102	0	2

with interest at 4 per cent. per annum from the 16th of February, 1876, until paid.

The defendant's solicitors gave notice that they objected to the report of the registrar, and filed a petition on objection, which in the 4th, 5th, and 6th paragraphs contained the following allegations:—

4. The defendant objects to the said report in so far as it finds that the plaintiff is entitled to have the sum of 200*l.* retained in Court to answer any claim that may be established against the plaintiff under the bond given by him in respect of the collision between the *Limerick* and the *Skitty Belle*, upon the grounds that such bond was given by the plaintiff without authority from, or due communication with, the owner of the *Limerick;* that the plaintiff himself was, at the time of the collision, conducting the navigation of the *Limerick*, and that he was personally liable in respect of the damage done to the *Skitty Belle*, by reason of the said collision, at the time when he executed the said bond.

5. And the defendant also objects to the said report in so far as the same allows to the plaintiff, by item 54 of the schedule thereto, the sum of 102*l.* 0*s.* 2*d.* in respect of a claim by Dowson & Worth, shipwrights, upon the ground that such sum never was claimed of the plaintiff by the said Dowson & Worth, and has never been paid by the plaintiff to the said Dowson & Worth, and that the plaintiff never was liable to the said Dowson & Worth in respect of the said claim.

6. And the defendant also objects to the said report in so far as it allows interest on the sum of 1048*l.* 19*s.* 7*d.* from the 16th of February, 1876, until paid, upon the ground that interest should only have been allowed on part of such sum, inasmuch as large sums found due to the plaintiff by the said report have not been paid out of pocket by the plaintiff, but were still due and owing by him at the date of the said report, and will be paid out of the proceeds of the said ship in the registry without interest.

The answer or objection alleged, inter alia, as follows:—

2. The bond referred to in the 4th article of the petition was given on behalf of the owners of the *Limerick* by the plaintiff, acting under the advice of the British Consul at Huelva, in Spain, where the collision occurred, and for the best interests of the owner of the *Limerick*, in order to prevent her arrest and detention in the port of Huelva and consequent expenses and loss of freight, and was, as they submit, within the scope of the plaintiff's authority. The act of the

plaintiff in giving this bond was approved and ratified by Frederick Ireland, the then managing owner of the *Limerick*. Insurances had been effected by the said Frederick Ireland for and on behalf of the owners of the *Limerick* against loss by collision, and the amount of the said bond has been, or might have been, recovered from the underwriters of the said insurances for the benefit of those interested in the *Limerick*.

3. They deny that the plaintiff was personally liable in respect of the damage done to the *Skitty Belle*, by reason of the collision referred to in the 4th article of the petition.

4. They say that Messrs. Dowson & Worth have claimed of the plaintiff the sum allowed in item 54 of the registrar's report, and they submit to the Court whether the plaintiff is liable or not in respect of the said claim.

5. They submit to such an alteration being made in the report as will reduce the item on which interest is allowed from the date of the report by those which are liabilities only and not payments out of pocket. The amount of such items, however, is only £149 16*s.* 11*d.*, and the interest thereon as allowed is very trifling, and not such as should be made matter of appeal.

March 21. *E. C. Clarkson*, for the defendant, in objection to the report of the registrar. The master of the *Limerick* is, on his own evidence, personally liable for the damage sustained by the *Skitty Belle* in the collision with the *Limerick*, and the Court will not in any way assist him to escape such liability. A personal action at the suit of the owners of the *Skitty Belle* would clearly lie against the master as well as against the owners of the *Limerick*: *The Volant* (1), to recover the very damages in respect of which the bond was given, and the master, being himself a wrongdoer, could not have recovered over from his owners the amount he would have been compelled to pay in such action, how then can he place himself in a better position by having turned the claim of the owners of the *Skitty Belle* from an unliquidated into a liquidated amount? The circumstances of the present case are analogous to those in the case of *The Ida* (2), and in that case the Court, though no decision was given on the point, would seem to have been of opinion that a master was only justified in raising money to obtain the release of his vessel detained in a foreign port in a case where a lien on the ship existed. As to the amount which the master alleges he is liable to pay to Messrs. Dowson & Worth, it is clear on the evidence that credit was primarily given to the owners of the *Limerick*, and that they dealt with the

(1) 1 W. Rob. 383. (2) Law Rep. 3 A. & E. 542.

1876

THE LIMERICK.

master as an agent only, he therefore cannot in the circumstances be allowed to charge the amount against them as a disbursement.

W. G. F. Phillimore, for the plaintiff, contrà. In giving the bond for 200*l.* the master of the *Limerick* exercised a wise discretion, and acted wholly in the interests of his owners. If such bond had not been given the *Limerick* would in all probability have been arrested at Huelva, and have been prevented from earning her freight. In case the vessel had been actually arrested, can there be any doubt that, in the circumstances, the master would have acted rightly in taking steps to release the vessel? If so, the same considerations must surely apply where, as here, the master knowing that a detention at Huelva would entail a loss on his owners, and being advised that his vessel was to blame for the collision, has given security to pay the amount of the damage done. The bond was given under the sanction of the British Consul, and, in fact, not only has there been a settlement of account with the master since the collision, but his act in admitting liability was ratified by his owners. The case of *The Ida* (1) is not in point, the question there really before the Court being in what circumstances a ship's agent abroad could take a valid bottomry bond from the master of a vessel for which he was agent. It is true that the owners of the *Skitty Belle* could have brought a personal action against the master to recover for the damages done in the collision, but it is another thing to hold that the owners of the *Limerick*, if compelled to make good such damage, could have recovered over from their servant, the master, where, as in this case, no fault except that of error of judgment can be attributed to him. The master has had notice that Messrs. Dowson & Worth look to him for payment of their bill.

E. C. Clarkson, in reply.

SIR ROBERT PHILLIMORE. I am asked to overrule the decision of the registrar on two points in this case. One is as to a sum of money due to Messrs. Dowson & Worth of 102*l.* 0*s.* 2*d.*, which the registrar has allowed, I understand, on the ground that it is at least doubtful whether the master be not liable to those who

(1) Law Rep. 3 A. & E. 542.

furnished the articles for the benefit of the ship, and I think it doubtful, in spite of the argument which has been addressed to me. I think it is very possible myself that the master may be found liable for the 102*l.* 0*s.* 2*d.* which has been advanced to Dowson & Worth; at all events, it is certainly a question as to which I should be sorry to give an off-hand opinion as to whether or not he may not be liable. But I think the justice and equity of the case will be answered by allowing the mortgagee to have the 102*l.* 0*s.* 2*d.* upon his giving security that if the master be found liable for this sum he will repay him.

That seems to me a fair proposition, and I think the same principle applies to the other item. The bond given by the master of the *Limerick* for 200*l.* in respect of the collision between the *Limerick* and the *Skitty Belle,* falls under the category of those cases decided in this Court, where the conduct of a master, acting bonâ fide for the purpose of getting his ship out of arrest in a foreign country, has always been upheld where no mala fides is shewn. (1) It may be that he is not personally liable under this bond, or it may be that he is personally liable; but I think that what he did was for the benefit of the ship, and for the benefit of the owners, and I think it would be a harsh thing to deprive him of a lien he would otherwise have had on the ship. I do not however see what harm will happen if the 200*l.* should have to be paid out of Court to the defendant on his giving security to repay the amount to the plaintiff in case he should be found liable on the bond. I am ready to make this modification of the registrar's report, but I am not disposed to go further.

The minute of the order as entered in the registry was as follows:—

"The judge, having heard counsel on both sides, adjourned for a fortnight the further consideration of the objection to the registrar's report in this cause, for the purpose of allowing the defendant to give within fourteen days, if he shall think fit, a valid guarantee to secure the plaintiff in respect of the sum of 102*l.* 0*s.* 2*d.*, claimed by Messrs. Dowson & Worth, being item No. 54 in the schedule annexed to the said report, and in respect of costs, if he

(1) See *The Karnak,* Law Rep. 2 A. & E. 289; 2 P. C. 505.

1876

THE LIMERICK.

shall be sued for the same, and also in respect of any claim that may be established against the plaintiff, under or in consequence of the bond for 200*l.* given by him and referred to in item No. 50 of the schedule to the said report."

April 4. *W. G. F. Phillimore,* on behalf of the plaintiff, moved the judge in Court to confirm the registrar's report, the defendant not having given the security ordered by the Court, and that the costs of the application, and all costs occasioned by the objection to the said report, might be costs in the cause if the said report should stand confirmed.

E. C. Clarkson, on behalf of the defendant.

His Lordship confirmed the registrar's report, save as to interest, and pronounced the sum of 1048*l.* 19*s.* 7*d.*, the amount set forth in the said report, to be due to the plaintiff, but with interest only on the sum of 872*l.* 13*s.* 6*d.*, at the rate of 4 per cent. per annum from the date of the report until payment thereof, and condemned the proceeds of the *Limerick* in the said sum of 1048*l.* 19*s.* 7*d.*, interest and costs, save the costs of the objection to the report, as to which he made no order.

Solicitors for plaintiff: *Lowless & Co.*

Solicitors for defendant: *Linklater & Co.*

May 16.

IN RE SMITH AND OTHERS.

Practice—Jurisdiction in respect of Damage done by a Foreign Ship on the High Seas—Supreme Court of Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *Schedule* 1, *Order II., Rule* 4, *Order XI., Rule* 1.

9 PD 31-2

A ship sailing under a foreign flag, and belonging to a foreign company established abroad, came into collision with, and did damage to, an English ship on the high seas. The owners of the English ship applied for leave to issue a writ of summons, of which notice should be given out of the jurisdiction, claiming compensation for the damage, against the foreign company. Leave refused.

The phrase, "within the jurisdiction," used in the Judicature Act, 1875, sch. 1, Order XI., Rule 1, means territorial jurisdiction.

IN the month of January last the British steamship *City of Mecca* was on the high seas, about nine miles from the mouth of

(a) See [illegible] (b) See [illegible]

the river Tagus, when she came into collision with the steamship *Insulana,* belonging to the Empreza Insulana Company of Lisbon, and damage was done to the *City of Mecca.* The solicitors acting on behalf of the owners of the *City of Mecca* applied in chambers by summons that a writ of summons, of which notice should be given out of the jurisdiction, claiming compensation for the damages done to their ship by the said collision, might be issued against the Empreza Insulana Company of Lisbon by leave of the judge, pursuant to the Judicature Act, 1875 (38 & 39 Vict. c. 77), sch. 1, Order II., Rule 4.

An affidavit was used in support of the summons, in which it was stated, inter alia, that the Empreza Insulana Company carried on business at Lisbon; that the directors of the company were not British subjects, and that the *Insulana* was registered at Lisbon as belonging to the directors of the company.

The summons was adjourned into Court.

E. C. Clarkson appeared on behalf of the owners of the *City of Mecca* in support of the summons. The collision having occurred on the high seas, where the Court has jurisdiction, the act in respect of which damages are sought to be recovered was an act done within the jurisdiction and under the provisions of Order XI., Rule 1, of the first schedule of the Judicature Act, 1875, the Court may allow the writ to issue and direct service of notice of the writ out of the jurisdiction.

SIR ROBERT PHILLIMORE. In this case the Court would, if the *Insulana* could have been arrested within the territorial jurisdiction, have had jurisdiction so far as the res was concerned; but it would, under the old law, have possessed no jurisdiction in personam over the owners of the res unless they could have been served with a citation within the territorial jurisdiction. I do not think that the legislature, in enacting the 1st Rule of Order XI., in the 1st schedule to the Judicature Act, 1875, contemplated any alteration of the law in cases similar to the present, and, in the circumstances, I am not satisfied that I can grant the leave asked for.

If I acceded to the application I should be exercising a juris-

1876
RE SMITH.

diction in personam over persons for doing an act at a time when they were without the territorial jurisdiction of this Court.

Motion refused.

Solicitors for the owners of the *City of Mecca*: *Gellatly, Sons, & Warton.*

March 18.

[IN THE ARCHES COURT OF CANTERBURY.]

CRISP *v.* MARTIN AND OTHERS.

Practice—Proctor—Solicitor of the Supreme Court—36 & 37 *Vict. c.* 66, *s.* 87.

A respondent in a cause of appeal in the Arches Court cannot appear by a solicitor of the Supreme Court of Judicature who is not also a proctor of the Arches duly qualified and admitted according to the ancient practice of that Court.

Burch v. *Reid* (Law Rep. 4 A. & E. 112) followed.

THIS was an appeal from a decree of the Consistory Court of Ely, decreeing the grant of a faculty for certain repairs and alterations in the parish church of Grantchester, at the promotion of the vicar and churchwardens of the same parish.

The appeal was interposed on behalf of Horace Edward Cripps, a parishioner of the parish of Grantchester, and the usual inhibition and citation inhibiting further proceedings in the Court below, and citing the Rev. William Martin, the vicar, and Henry James Banyard and Frederick Wells Lilley, the churchwardens, and the parishioners and inhibitants respectively of the parish of Grantchester aforesaid, to enter an appearance in the registry of the Court of Arches issued in the ordinary course, and was duly served on the 3rd of February last. Mr. Sydney Gedge, a solicitor of the Supreme Court of Judicature, had conducted the proceedings on behalf of the vicar and churchwardens in the Consistory Court of Ely, and within six days after the return of the inhibition and citation he applied in the registry to enter an appearance for them in the appeal. The deputy-registrar allowed the appearance to be entered de bene esse.

Montague Cookson, Q.C., on behalf of Mr. Gedge, who had been retained as solicitor for the vicar and churchwardens, applied

See more the Legal Practitioners Act 1876 (39 & 40 Vic. c. 67)

to the Court "to direct the registrar to accept the appearance by Mr. Gedge on behalf of the respondents, and to declare that upon such appearance being entered the said Mr. Gedge might be entitled to perform all such acts and enjoy all such powers, authorities, and privileges as appertain, or have appertained, to the office and practice of a proctor of the Court of Arches, or otherwise that he might forthwith be admitted and enrolled as a proctor of the Court of Arches by virtue of his being a solicitor of the Supreme Court of Judicature, or that the judge would suggest and recommend to the Archbishop of Canterbury that his grace's fiat and commission for such purpose might be granted."—Having regard to the recent decision of the Court in the case of *Burch* v. *Reid* (1), where it was decided that in the state of the law then existing appearances could, in the Court of Arches, only be entered personally or by a proctor, the present application could hardly have been made if it were not for the subsequent passing of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66). That Act, however, in s. 87, has enacted that ". . . . all persons admitted as solicitors, attorneys, or proctors of, or by law empowered to practise in, any Court the jurisdiction of which is transferred to the High Court of Justice or the Court of Appeal, shall be called solicitors of the Supreme Court, ... and all persons who from time to time, if this Act had not passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of, or been by law empowered to practise in, any such Courts, shall be entitled to be admitted and to be called solicitors of the Supreme Court, ... and shall, as far as circumstances will permit, be entitled, as such solicitors, to the same privileges and be subject to the same obligations as if this Act had not passed." Now, the Master of the Rolls has recently decided (*In re Toller* (2)) that, under the provisions of this section, a proctor of this Court and of the High Court of Admiralty, who had not been admitted a solicitor within the year allowed for that purpose, by the Probate and Divorce Act, 1857 (20 & 21 Vict. c. 77), s. 40, was entitled, on going through certain formalities, to be admitted to all the privileges of a solicitor of the Supreme Court, and would, on being so admitted, be empowered to practise in the

(1) Law Rep. 4 A. & E. 112. (2) L. T. Jan. 1, 1876, pp. 159–161.

1876

CRISP
v.
MARTIN.

High Court of Justice and the High Court of Appeal. It must therefore be taken that the effect of this section is to give to the whole body of proctors the right which they did not previously possess, of practising in all the Divisions of the Supreme Court. Has not, then, the time arrived for reconsidering whether this Court should not be thrown open to the whole body of solicitors? Even if a correlative right to have the Court thrown open has not been expressly given by the Judicature Acts, it could never have been intended that, whilst obtaining new privileges, the proctors should still retain the monopoly of practice here. If any appreciable injury to them can be shewn to result from the admission of other persons to practise in this Court, that might without doubt be a proper reason for applying to the legislature for compensation; but as to this, it must be remembered that when the Court of Admiralty was thrown open, no compensation was given to the proctors, though the practice of some of them must have been affected by the measure. It is in accordance with public policy that the exclusive rights of the proctors should be abolished, and it must surely be within the powers of the Court to make regulations as to the persons to be admitted to practise before it. The statutes 53 Geo. 3, c. 127, and 33 & 34 Vict. c. 28, although they prohibit persons who have not been admitted as proctors from practising as proctors, in no way prescribe what are to be the qualifications of the persons who may legally be so admitted.

Dr. Deane, Q.C., on behalf of proctors opposing the application. The provisions of the Judicature Acts do not apply to this Court at all, and can have no bearing on the question raised by Mr. Gedge. This being so, the case of *Burch* v. *Reid* (1) is decisive as to the first part of the application. With respect to so much of the application as prays for an alteration of the qualifications now required of persons to be admitted as proctors, the case of *Fell* v. *Bond* (2), referred to in *Burch* v. *Reid* (1), is conclusive; laying down as it does the principle that where an exclusive right of practising before a particular court has been conferred on a body of persons by statute, as is the case here, such right cannot be divested by means of an order of the Court before which they are so entitled to practise. There is, in reality, no

(1) Law Rep. 4 A. & E. 112. (2) 1 Robert. 740.

reason whatever for disregarding the interests of the proctors, inasmuch as the existing number of practising proctors is amply sufficient to conduct the business of the Court.

W. C. Cookson, Q.C., in reply:—

In the course of the arguments, the Public Worship Regulation Act, 1874 (37 & 38 Vict. c, 85), s. 11, and the case of *Stephenson* v. *Higginson* (1) were referred to, and the authorities before the Court in *Burch* v. *Reid* (2) were commented on.

LORD PENZANCE. Before entering upon the immediate matter of this application I should like to dispose of one suggestion which has been made in argument, and as to which I really have no doubt. It has been suggested that the existing number of proctors is likely to dwindle, and that this would be a very serious public grievance to the suitors of this Court. On the other side, it has been argued that even if the number did so dwindle down as to consist of not more than one, that still this Court could do nothing to remedy the evil. I am very clear upon this, that this Court, unless there is any statute which has not been brought to my notice to the contrary, has, like other courts, the power of indicating under what circumstances and subject to what conditions the officers who practise in it should have the right to such practice. Subject to statute each court would, I think, have the right to indicate what should be the necessary qualification for a man to be admitted as an attorney or proctor, as the case might be. I have, therefore, no doubt that if the number should dwindle down to so small a number that it can be shewn to the Court that the public are in any way likely to suffer, the rules of this Court with regard to the admission of proctors would be so modified as to cure that evil. But that is not the present state of things, and that is not the ground upon which the present application is based. The present application is based upon what is said to be public policy in the matter, and upon the statement that in analogous cases occuring one after another the legislature has removed the restriction which, before certain recent Acts of the legislature, existed with respect to the practice of solicitors in various courts where proctors alone could

(1) 3 H. L. C. 638. (2) Law Rep. 4 A. & E. 112.

1876

CRISP v. MARTIN.

practise before, and has thrown the practice in such courts open to the general body of legal practitioners in this country; and I am asked, upon a view of that policy, to do by the act of this Court what has hitherto been done only by the legislature.

I think that it must be admitted that, however strong the policy of removing such restrictions may be delineated in Acts of Parliament which have been passed at various times, it is manifest that this Court is asked to take a somewhat forcible step when it is suggested that it should usurp the place of the legislature in the matter, and deal with a strong hand with the rights of individuals, upon a supposition of some general policy which has been enacted in Acts of the legislature. Now the review of the Acts which has been put before me places the matter in this light: It appears by the statute of 53 Geo. 3, c. 127, that there was a distinct provision, accompanied by a penalty, precluding anybody from acting as a proctor who had not been properly admitted and enrolled as such, and I agree with Mr. Cookson's argument that this does not go beyond this, that a man must be admitted and enrolled as a proctor, otherwise he cannot practice, but that it does not prohibit this Court from altering the rules under which a man may be so enrolled. Then the next Act referred to before me is the 33 & 34 Vict. c. 28, which was passed in 1870. That was an Act in which the practice of all the ecclesiastical courts in the kingdom, except the provincial courts and the Consistory Court of London, was thrown open to solicitors, and the penalties which existed at that time under the statute of 53 Geo. 3 were declared to be no longer applicable to persons who practise in all the courts so thrown open without being proctors, but in that Act the rights of the proctors in the provincial courts of Canterbury and York, and the Diocesan Court of London, were expressly excepted. I agree again with Mr. Cookson that that only goes as far as this, that whereas before the year 1810 no one could practise in any of the ecclesiastical courts as a proctor without being properly admitted and enrolled, and would have to pay a penalty if he did, this Act enabled everybody to do so in all other courts except this Court and the Court of York and the Diocesan Court of London.

So stands the matter on the general rights of the proctors.

Then, in 1858, came the institution of the Probate Court. That was the creation of a new court with new powers. The old jurisdiction of the Prerogative Court was handed over to it. The powers and jurisdiction of the Court were very much enlarged, and although there was to some extent a transfer of jurisdiction, it was much more largely the creation of a new jurisdiction. Now in the Act (20 & 21 Vict. c. 77) there is an express clause that the practice of the Court should not be confined to proctors, but should be open to solicitors; but there were also express provisions that the injuries done to the proctors should be admitted to compensation, and, in fact, that compensation was given on account of their having in future to share, not only their testamentary, but also their matrimonial business, with the great body of solicitors in the country, for other Acts of Parliament were passed in the same session whereby the provisions of the Probate Act were made applicable to matters of divorce as well. Therefore, in 1858, the proctors lost a great portion of their monopoly —the matrimonial business and the testamentary business, by far the most lucrative portions of their practice, and they had in future to share that business with the profession at large, but they were given compensation.

In 1859 the Act throwing open the Admiralty Court was passed (21 & 22 Vict. c. 6), and it is a fair remark that on that occasion the legislature did not think it right to give compensation. If I am right in supposing that the compensation which the Treasury awarded on the Probate Act was limited to the practice of the proctors in testamentary and divorce matters, it would be a fair observation that in the subsequent year the proctors were stripped of their monopoly of practice in the Admiralty Court, although the compensation of the previous year had in no way extended to that Court. I rather think it was so. It stands therefore thus, that in these two years the legislature did throw open the Probate, the Divorce, and Admiralty Courts, in the one case giving compensation, in the other not giving compensation. Then on the coming into force of the Judicature Acts power was given to the judges of the Supreme Court to make general rules regulating its practice, and the legislature by these Acts have admitted proctors, solicitors, and attorneys to practise pari passu in that Court.

1876

CRISP v. MARTIN.

That is the history, then, of those legislative provisions with regard to proctors' rights, and, as I have in effect said, the result is that the business of the proctors has been from time to time invaded—solicitors have been let in to practise with them, first in one court and then in another, and that the change has sometimes been accompanied with compensation, sometimes it has not, but in all cases it has been done under the direct authority of the legislature. Now, matters so standing—I must say a word presently on the Judicature Act, 1873—I think it is very difficult to maintain that this Court has the power directly to throw the Court open to other persons than proctors. I use the word "directly," as indirectly I think what is asked might be done, by the provisions under which persons are permitted to practise here being altered; but the way in which the legislature when it wished a court to be thrown open has effected its purpose has not by any means been by altering the conditions under which proctors should be admitted, but it has said at once that as a qualification for practice it is not necessary that a man should be other than a solicitor, and I think it is very difficult under these circumstances to contend that this Court could do the same.

But now I will come to the Judicature Act, 1873. The provisions of the Judicature Act are, I think, very intelligible. I do not say that the wording of the section referred to might not be open to another construction, but I think the general provision is obvious enough. We must recollect what the Judicature Act, 1873, did. It infused, as it were, into one new court various existing courts—the Courts of Probate and Divorce, Common Law and Equity and Admiralty. Well, in the Courts of Common Law attorneys practised. In the Courts of Equity solicitors practised. In the Courts of Probate, Divorce, and Admiralty, attorneys and solicitors and proctors practised. All these courts were drawn together into one court by the Act, and it would seem almost an obvious provision of such an Act that the various officers of the different courts should be also allowed, all of them, to practise indiscriminately in any branch of the new court. It would be especially necessary that there should be a provision of that kind, when it is borne in mind that a part of the provisions of the Judicature Act, 1873, and a very material part in the judgment of

those who framed it, is that on no occasion shall a suitor be put to any difficulty or expense by reason of his having commenced his suit in any particular division of the court, which division of the court could not fully and adequately do justice in a particular suit, and consequently there was a provision that the various divisions should be able to act together, and that any matter arising in one of the divisions could be handed over to another. Under such circumstances, the keeping up of a separate body of men capable of practising in one of the divisions and not in another, would be really an impossibility, and therefore there was inserted in the Act a provision, which I have no doubt the Master of the Rolls rightly interpreted (1), that a person who is capable of practising in any one of the courts, the jurisdiction of which has been transferred to the Supreme Court, should be allowed to practise in any other. I have no doubt that the provision has been rightly interpreted. What bearing, however, has that provision upon this Court, which was in no way created by the Judicature Act, which was outside it, and in respect of which no such necessity exists? It appears to me that any argument in this case, from the passing of the Judicature Act, can only be material to this extent, namely, that the passing of the Act is another instance which shews that the policy of the legislature is not to favour the existence of separate bodies of men practising in separate courts, but to throw open generally to the whole profession of the law the practice in all courts. This is a very desirable policy, and I should not be in any way surprised if this matter was brought before the legislature, that they should decide that this court, like the others, should be thrown open, and it would then be for the legislature, if they thought it right, to give compensation. Now, if I were to take the matter in hand, I could only do the wrong, and could not give compensation if I thought it was due. That consideration alone is sufficient, in my mind, to induce me to refuse to act in such a matter. The legislature may think it right to give compensation, and they have the power. I have no power to give compensation. I do not know that it is not quite as much a matter of justice as in the case of the Probate Court. At any rate, I have no power to entertain the question one way or the other.

(1) See *In re Toller*, L. T. Jan. 1876, pp. 159–161.

1876

CRISP v. MARTIN.

One more word upon the subject of the policy of the matter. It must be borne in mind that the Judicature Act has assimilated the practice of the various courts effected by it, but that, as regards this Court, the practice is wholly and totally different. I have had some experience in the Courts of Probate and Divorce of the evils —I do not say they may not be compensated for by benefits in an opposite direction—which, under the present system, exist in courts of that character, in which the business is limited, and in which, therefore, there is not a general opportunity for the whole mass of the profession to inform themselves; of the evils, I mean, of men practising in a court who are utterly unacquainted with the practice of such courts. These evils lead very often to a great quantity of money being thrown away, from the want of that technical skill and knowledge which is to be obtained only by experience on the part of those who act for the suitors. Perhaps evils of this kind are compensated for by benefits in the opposite direction; for we all know that monopolies and close bodies of men are evils of themselves, and lead to expense in many ways. For these reasons, there may be a good deal to be said on the policy of throwing open to the whole body of the profession the very small amount of business which belongs to this Court, in which the practice at present is in so totally a different state to the practice in other courts of the kingdom. And although I hope that the time will come when the powers of the Court will be sufficient to improve that practice, and in a great measure to assimilate it to the practice of other courts, I feel that there would be a great deal to be said as the matter now stands, on the policy of throwing this court open, if I had the power so to do. Under all the circumstances of the case, therefore, I think I must refuse the application.

Application refused.

Solicitors for applicant: *Gedge, Kirby, & Millett.*

Solicitors for proctors opposing the application: *Moore & Currey.*

[IN THE CONSISTORY COURT OF LONDON.]

1876
April 3.

IN RE THE RECTOR AND CHURCHWARDENS OF ST. GEORGE-IN-THE-EAST.

Faculty—Churchyard closed for Burials under Order in Council—Public Garden—Discretion of the Court in Faculty Cases.

On an application for a faculty to sanction the appropriation of a portion of a churchyard, which had been closed for burials under an Order in Council, for the purpose of a public garden, the Court authorized the construction of footpaths in such portion of the churchyard for the convenience of the parishioners, and the erection of gates to give them access to it.

IN this case an application was made to the Consistory Court of London, praying for the grant of a faculty to enable the rector and the churchwardens of the parish of St. George-in-the-East to make certain alterations in the churchyard of the said parish, and to appropriate a portion of the same for the purpose of a public garden, at the promotion of the said rector and churchwardens.

The petition to lead the faculty alleged in substance as follows:—

It being thought desirable to form a public garden at the east end of the churchyard of the parish of St. George-in-the-East with proper access thereto, a committee was appointed to consider the same and report thereon.

The report of the said committee recommended, inter alia, that the wall separating the churchyard from a disused burial-ground attached to the Wesleyan chapel, as shewn in a plan annexed to the petition, should be taken down.

A vestry meeting duly convened for that purpose was held on the 2nd of December, 1875, at which the said report was read and considered, and the before-mentioned plan submitted, when it was unanimously agreed that so much of the said report and plan, as related to the proposed alteration in the churchyard of the said parish by appropriating part thereof to a public garden, be approved of, and that a faculty be applied for to carry out the same.

Such proposed alterations, so far as relates to the churchyard, will consist of pulling down the boundary wall between the church and chapel burial grounds at the north side thereof, and constructing a dwarf boundary wall where indicated by the dotted line shewn in the said plan, with an iron railing thereon.

1876

RE ST. GEORGE-IN-THE-EAST.

The churchyard of the said parish has been closed for several years under an Order in Council issued for that purpose. None of the bodies or remains will be removed from that portion of the churchyard which is to form part of the proposed public garden, but the memorial stones will be carefully removed therefrom and placed against the interior wall of the enclosed churchyard.

The estimated expense of the said alterations, so far as respects the taking down the said wall of the churchyard and constructing a new wall with iron railings thereon, and the removal and the replacement of the memorial stones as aforesaid will be about 500*l.*, and will be defrayed by the vestry out of the rates levied pursuant to the Metropolis Management Acts.

Your petitioners therefore humbly pray that you will be pleased to decree a licence or faculty for the purposes aforesaid.

The usual citation with intimation issued and was duly served, but no person appeared to oppose the grant of the faculty, and on the 6th of March last Dr. *Deane, Q.C.* (*W. G. F. Phillimore* with him), on behalf of the petitioners, applied to the Court to decree the faculty to issue as prayed. They referred to 18 & 19 Vict. c. 120, ss. 158–161, *Reg.* v. *Twiss* (1), and *In re Bettison.* (2)

On the 27th of March the case came again before the Court, and after certain witnesses on behalf of the petitioners had been orally examined, the learned chancellor personally inspected that portion of the churchyard which the petitioners proposed should be appropriated for the purposes of a public garden.

Cur. adv. vult.

April 3. DR. TRISTRAM. This was an application to the Court by the rector and churchwardens of the parish of St. George-in-the-East, to issue a faculty authorizing them to appropriate the further or lower end of the eastern portion of the parochial churchyard as a public garden, and to make proper access thereto, and other alterations in furtherance of the said object.

On the faculty being moved for, it seemed to the Court that there were objections to granting it in the terms prayed; but as the application was made in accordance with an unanimous vote of the vestry, and with the general concurrence of the parishioners,

(1) Law Rep. 4 Q. B. 407. (2) Law Rep. 4 A. & E. 294.

the Court directed the case to stand over for further evidence and for consideration. In the interval I have inspected the churchyard, and the rector, the churchwardens and vestry clerk, attended a Court held on Monday last, and gave further evidence and explanations in support of the application.

The application in question relates to that part of the eastern portion of the churchyard which is furthest from the church, comprising a narrow strip of the old churchyard and a considerable piece of ground which was acquired by the parish by purchase out of the church rates in 1829, and was then added to the old churchyard and consecrated.

In 1856 the churchyard was by an Order in Council closed for burials.

This addition to the churchyard has been but little used for burials. It contains a few gravestones but no grave mounds. It is planted with some clumps of trees and flower-beds, and there are gravel walks across and around it. It abuts on the south side on Ratcliffe Street which leads into Ratcliffe Highway, on the north side, on a Wesleyan burial-ground running up to Cable Street. It is fenced in on the north and south sides by high walls, which impede the full circulation of air between Cable Street and Ratcliffe Street. Arrangements have been made by the vestry, with the sanction of the Metropolitan Board of Works, to purchase, out of funds secured or raised by parochial rates, the Wesleyan burial-ground, with the view of laying it out and planting it as a garden for the use of the parishioners, with an entrance to it from Cable Street, and this Court is asked to sanction a somewhat similar plan of planting and laying out this portion of the churchyard. The scheme involves the taking down of a portion of the high walls on the north and south sides of the churchyard, the removal of certain tombstones, which it is proposed to place against the wall of the churchyard, the fencing off of the old portion of the churchyard (with the exception of a narrow strip) by iron railings, and the continuance of the foot-path from the Wesleyan burial-ground, through the new portion of the churchyard to Ratcliffe Street.

The plan in question was unanimously approved of by a large meeting of the parishioners, convened by the rector and church-

1876

RE ST. GEORGE-IN-THE-EAST.

wardens in March, 1875, on the understanding that it was not to involve the disinterment of any bodies or remains. This meeting led to a petition signed by 700 of the parishioners, including the principal ratepayers, being presented to the vestry, urging the vestry to take the steps requisite to carry out the scheme, and to a subsequent unanimous vote of the vestry in approval of it.

On principle and authority I entertain no doubt that it is not competent to this Court to grant a faculty authorizing a churchyard to be appropriated as a public garden: *Reg.* v. *Twiss.* (1) But the churchyard is under the control and protection of the Court, and it is in the discretion of the Court to authorize by a faculty the construction of footpaths in it for the convenience of the parishioners: *Walter* v. *Mountague* (2); the removal of high walls which obstruct the free circulation of air, the planting of it with trees and with flowers, as it is closed for burials; the erection of gates in order to give the parishioners access to it, and other minor alterations. In the exercise of this discretion the Court is bound, in the words of Sir John Nicholl, "to exercise a sound discretion, having a due regard to times and circumstances and to the rights and interests of all parties concerned": *Butt* v. *Jones.* (3) In the present case, the parties interested, the parishioners and the families of those who have been buried in this part of the churchyard, as far as the Court can ascertain, without a dissentient voice, desire that the parishioners should have free access to this portion of the churchyard during certain hours.

The Court has jurisdiction to make an order which will give them such access, and if it makes it, it does not confer on the parishioners of St. George-in-the-East any greater right in regard to their churchyard than that which is enjoyed by the parishioners of very many country parishes, or even of very many town parishes in England. If it sanctions directly or indirectly the ground being planted with flowers, it will be doing nothing that can be construed as desecrating or altering the character of the place, or as offering any disrespect to the dead. Where tombstones are removed it will take care that the places of interment are so marked that the relatives or friends of those buried

(1) Law Rep. 4 Q. B. 407. (2) 1 Curt. 253, 261.
(3) 2 Hag. Ecc. Rep. 417, 424.

there will be able to distinguish the spot where they lie. The removal of the high walls that impede the free circulation of air between Cable Street and Ratcliffe Street will, according to the evidence of the rector and churchwardens, conduce greatly to the health of the neighbourhood. The continuance of a footpath from Cable Street through the Wesleyan burial-ground and the eastern portion of the churchyard to Ratcliffe Street will be a great convenience to many of the parishioners, saving them a circuitous route of about a quarter of a mile when going from Cable Street to Ratcliffe Highway; and it will have this further advantage—one which has great weight with the Court in considering the application—that it will give many of the parishioners living in the north part of the parish a much shorter road to their parish church.

The churchwardens are prepared to undertake so to protect this ground as to preclude the occurrence of anything in it open to just exception; and it will still remain subject to the orders of this Court, to which application can at any future time, if required, be made.

The Court is prepared to issue a faculty to give access to the parishioners to this portion of the churchyard, and to make the other alterations indicated, and in granting it is satisfied that it is exercising a sound discretion, having due regard to the special circumstances of the case, and the interest of all parties concerned.

Any application relating to the details of the faculty may be made to me in chambers.

Proctor for petitioners: *Clarkson.*

Distinguished. In re St. Peter St. Helier, Morden [1951] P. 303

1876
Feb. 26.

[IN THE ARCHES COURT OF CANTERBURY.]

CLIFTON *v.* RIDSDALE.

Public Worship Act, 1874, 37 & 38 *Vict. c.* 85—*Administration of the Communion to less than three Persons—Crucifix—Stations of the Cross and Passion—Practice—Stay of Proceedings pending Appeal.*

2 PD 126-7, 132, 133-8
PD. 112
QBD 701
PD 134
PD 170

In a proceeding under the Public Worship Regulation Act, 1874, it was proved that the respondent, the incumbent of a parish church, had at the celebration of the Holy Communion consecrated and received the elements when only one person communicated with him. It was also proved that a like infringement of the rubric had taken place on several previous occasions during his incumbency, and that no steps had been taken by him to prevent its recurrence:—

Held, that the respondent must be admonished to obey the rubric.

In the church of which the respondent was the incumbent there was set up and retained under his directions, upon the top of a screen of open ironwork at the entrance of the chancel, a crucifix of metal, in full relief and about eighteen inches long. The crucifix, which stood on the highest portion of the centre of the screen, was turned towards the congregation. Along the top of the screen was a row of candles coming close up to the crucifix on either side. These candles were lighted at evening service:—

Held, that the crucifix so surmounting the screen, not being an architectural decoration, but being in danger of being an object of superstitious reverence, must be removed as unlawful:

Semble, that the set of delineations used in Roman Catholic churches, and commonly called "Stations of the Cross and Passion," are decorations forbidden by law in churches of the Church of England.

In cases under the Public Worship Regulation Act, 1874, where questions of law and fact are involved, the Court will hear two counsel on each side, and one counsel in reply.

Principles in accordance with which the discretion of the Court in ordering a stay of proceedings during the pendency of an appeal, under the 9th section of the Public Worship Regulation Act, 1874, will be exercised.

On the 1st of November, 1875, a representation in pursuance of the Public Worship Regulation Act, 1874, under the hands of three parishioners of the parish of St. Peter's, Folkestone, who were members of the Church of England and had, for more than one year before the date of the representation, had their usual abode within the district chapelry of St. Peter's, Folkestone, was received in the registry of this Court from the registrar of the diocese of Canterbury (1): the representation so received, and in

(1) Together with the representation the following documents were also transmitted to the registry:—1. Declarations by the complainants that they

which the Rev. Charles Joseph Ridsdale, perpetual curate of the parish of St. Peter's, Folkestone, was the party complained of, was dated the 10th of August, 1875, and was, so far as material, in terms as follows:—

1. The Rev. Charles Joseph Ridsdale, the incumbent or perpetual curate of the said district chapelry (over which he has the exclusive cure of souls), on Sunday, the 4th of July, 1875, in his church or chapel of St. Peter, being the church or chapel of the said district chapelry, at the early service commencing at 7.30 a.m., and again at the mid-day service commencing at 10.30 a.m., and also on Sunday, the 11th of July, 1875, at the like mid-day service unlawfully used lighted candles on the communion table at which the Communion was at the said times respectively being celebrated, or on a ledge immediately over the same, during the celebration by him of the Holy Communion, and when such lighted candles were not wanted for the purpose of giving light.

2. At all the said services on the said days the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service and in the administration of the Communion, unlawfully wore certain unlawful ecclesiastical vestments other than and besides or instead of those appointed and allowed by law, to wit, a vestment known as an alb, and a vestment known as a chasuble.

3. At all the said services on the said days the said Rev. C. J. Ridsdale, when officiating in the said church in the Communion Service, unlawfully mixed water with the sacramental wine used in the Communion, and also then administered or caused to be administered wine mixed with water to the communicants at the Lord's Supper.

4. At all the said services on the said days the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service and in the administration of the Communion to communicants, unlawfully used in such service and administration wafer bread or wafers, to wit, bread or flour made in the form of circular wafers, instead of bread such as is used to be eaten.

5. At the said mid-day services, commencing at 10.30 a.m. on the said 4th of July and on the said 11th of July, the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service, unlawfully stood, while saying the prayer of consecration in the said service, at the middle of the west side of the communion table (such communion table then standing against the east wall, with its shorter sides towards the north and south), in such wise that, during the whole time of his saying the said prayer, he was between the people and the

---

were members of the Church of England. 2. A joint declaration by the complainants that they were resident, as required by the Act, in the district of St. Peter's, Folkestone, and that the statements in the representation were true. 3. A certificate from the diocesan registrar to the Archbishop of Canterbury of the failure of the complainants and the party complained of to state their willingness to submit to the directions of the archbishop touching the matter of the representation. And, 4. A requisition from the Archbishop of Canterbury to the judge to hear and determine the matter of the representation.

1876

CLIFTON v. RIDSDALE.

communion table with his back to the people, so that the people could not see him break the bread or take the cup in his hand.

6. At the said mid-day services, on the said 4th of July, 1875, and the said 11th of July, 1875, the said Rev. C. J. Ridsdale, when officiating in his said church in the Communion Service, and saying the prayer of consecration in the said service, did not continue in a standing position, but twice unlawfully knelt or bent the knee during the reading thereof.

7. At the said mid-day service, commencing at 10.30 a.m. on the said 11th of July, 1875, immediately after the conclusion of the Prayer of Consecration in the Communion Service, the said Rev. C. J. Ridsdale unlawfully caused to be sung in his said church the words, or hymn, or prayer commonly known as "The Angus," that is to say, "O Lamb of God, that takest away the sins of the world, have mercy on us."

8. At the said mid-day service, commencing at 10.30 a.m. on the said 4th of July, 1875, and at the like service on Sunday, the 1st of August, 1875, the said Rev. C. J. Ridsdale, when officiating in his said church, unlawfully celebrated the Lord's Supper in the course of divine service, and himself then consecrated and received the elements when only one person communicated with him.

9. At the said mid-day service, commencing at 10.30 a.m. on the said 4th day of July, 1875, the said Rev. C. J. Ridsdale, in his said church, after the conclusion of morning prayer, and immediately before the commencement of the Communion Service, and as connected with such Communion Service, and in the presence of the congregation then assembled in the said church for such service, unlawfully formed and accompanied a procession consisting of the choir and of two acolytes in short surplices and red cassocks, and four banners and a processional cross were carried in such procession, and it proceeded from the chancel down the north aisle and up the nave back to the chancel again, the choir singing a hymn while walking in the procession, and the said Rev. C. J. Ridsdale, while taking part in such procession, wore a chasuble, and had a cap called a biretta upon his head, and on the return of the procession to the chancel the Communion Service at once commenced.

10. On the occasion of the evening service on the evening of Sunday, the 4th of July, 1875, and immediately after an offertory which took place at the conclusion of the sermon, and without any break or interval, and as connected with such service, and in the presence of the congregation assembled for such service, the said Rev. C. J. Ridsdale, in his said church, unlawfully caused a like procession to that before mentioned, as having taken place at the morning service, to be formed, and accompanied the same round the church, in like manner singing, and at one period of such procession all those who took part in it fell upon their knees and remained kneeling for some time, and after their return to the chancel the general thanksgiving was intoned, and the congregation were then dismissed.

11. The said Rev. C. J. Ridsdale, without lawful authority, and unlawfully, and since the consecration of his said church, that is to say, in the year 1872, set up and placed upon the top of the screen separating the chancel of the said church from the body or nave thereof, and still unlawfully retains there, a crucifix and twenty-four metal candlesticks with candles, and at the ordinary evening service on Sunday, the 4th of July, 1875, the said candles were lighted on either

side of such crucifix, and so continued during such service, although the other lights in the church were amply sufficient to light the church, and the said candles were not wanted for that purpose.

12. The said Rev. C. J. Ridsdale, without lawful authority and unlawfully, set up and placed in his said church, since the consecration thereof, that is to say, in the year 1871, and still unlawfully retains therein, certain representations of figures in coloured relief of plastic material, purporting to represent scenes of our Lord's passion, attached to the walls of the said church, and forming what are commonly called stations of the cross and passion, such as are commonly used in Roman Catholic churches, and not in churches of the Church of England, and some of the said representations relate to legendary and superstitious scenes not part of the gospel history, and not accepted or recognised as authentic by the Church of England, and the said representations as a whole tend to encourage ideas and devotions of an unauthorized and superstitious kind, and are unlawful.

13. The said acts, matters, and things hereinbefore mentioned are respectively alterations in or additions to the fabric, ornaments, or furniture of the said church, made without lawful authority, decorations forbidden by law, unlawful ornaments of the minister of the said church, failures on the part of the incumbent to observe, and cause to be observed, the directions contained in the Book of Common Prayer, relating to the performance in such church of the services, rites, and ceremonies ordered by the said book, or unlawful additions to and alterations of such services, rites, and ceremonies. (1)

On the 10th of November an appearance was entered on behalf of Mr. Ridsdale as respondent, and the complainants having subsequently given in an appearance and paid into the registry the sum of 300*l.* as security for costs, the proctor for the respondent, on the 17th of December, filed in the registry an answer. (2)

The 1st article of the answer admitted that, as stated in the 6th head of the representation, the respondent did on Sunday the 4th of July, 1875, kneel or bend the knee once only during the prayer of consecration, the order of the administration of the Holy Communion, and that such kneeling or bending the knee, alleged to have since been discontinued by him, was unlawful.

(1) At the hearing the Court intimated that although there was no prayer given in the form of the representation as sketched by the Public Worship Regulation Act, 1874, and the rules and orders made under its provision, it was desirable that a prayer on behalf of the complainants should be filed in accordance with the practice in other cases.

(2) In pursuance of an order made by the Court on the 25th of November, proxies authorizing proceedings in the matter of the representation, were, according to the practice in other cases within the jurisdiction of the Court, filed in the registry on behalf of the complainants and the respondent respectively.

1876

CLIFTON v. RIDSDALE.

The answer then proceeded in substance as follows:—

2. I, the Rev. Charles Joseph Ridsdale, save as aforesaid, do not admit, and I require the complainants to prove, every charge which they have made in the representation.

3. The vestments respectively known as an alb and a chasuble, are, I submit, not unlawful ecclesiastical vestments, as alleged in the 2nd head of the representation.

4. At the mid-day service on Sunday, the 4th of July, 1875, and at the same service on Sunday, the 1st of August, 1875, and during the whole of the said service there were present in the church of Saint Peter a convenient number to communicate with the priest, and every opportunity was given to them and every of them to communicate with the priest.

5. On the 25th of August, 1870, a faculty was granted by the Commissary Court of Canterbury for the erection of a screen of ornamental ironwork in the said church of St. Peter. This screen, separating the chancel from the nave, was erected in the year 1872. The upper part of the screen consists of an iron unpainted figure of our Saviour, about eighteen inches long, upon the cross, and twenty-four brass sconces for candles screwed into the end of every upright rod of the screen. The said figure of our Saviour upon the cross, and the said brass sconces form part of the said screen, and the whole screen was erected at the same time and in one piece.

6. The parishioners of the parish and church of St. Peter, Folkestone, have an interest in the retention of the said screen, consisting as aforesaid, in the said church, and I am advised that they are necessary parties to any suit in which any order may be made for the removal of the said screen or any part thereof.

7. There are in the said church of St. Peter, embossed pictures or framed squares of plastic material coloured and in relief, purporting to represent scenes of our Lord's Passion, hanging on nails driven into the walls of the nave and aisles of the said church. These embossed pictures have been so hung since the 8th day of September, 1871. They are, I submit, not unlawful.

8. The allegations in the 12th clause of the representation, that the representation of figures purporting to represent scenes of our Lord's Passion, are such as are commonly used in Roman Catholic churches, and not in churches of the Church of England, and that some of the said representations relate to legendary and superstitious scenes, not part of the gospel history, and not accepted or recognised as authentic by the Church of England, and that the said representations as a whole tend to encourage ideas and devotions of an unauthorized and superstitious kind, are, I submit, irrelevant, immaterial, and calculated to prejudice, and improperly made against me.

The 9th article of the answer stated in effect that the respondent had, in March, 1874, been served with a monition from the Commissary Court of Canterbury, calling upon him and the churchwardens of St. Peter's, Folkestone, to shew cause why certain representations of figures in coloured relief, of plaster materials, representing scenes of our Lord's Passion, attached to the walls of the

said church, and commonly called stations of the cross and passion, should not be removed; that the respondent was informed that the said churchwardens did shew cause, and having succeeded in a technical objection they had taken to the proceedings, were ultimately dismissed from the suit; that by reason thereof the embossed pictures in the said church, which were intended by the representation of figures mentioned in the said monition, had not been removed from the church, and that the churchwardens and the parishioners of the said church of St. Peter had an interest in the retention of the said embossed pictures in the said church, and were necessary parties to any suit in which any order might be made for the removal of the said embossed pictures. (1)

The 10th article of the answer was in terms as follows:—

I submit that, if necessary, the Court should grant a faculty, or direct a faculty to be applied for, to confirm the erection or hanging-up of the said embossed pictures.

The answer concluded with a prayer that the respondent might be dismissed from all further observance of justice in the matter of the said representation.

An agreement under the provisions of the 9th section of the Public Worship Act, 1874, that the evidence should be taken by a short-hand writer, and that a special case should not be stated, having been entered into between the complainants and the respondent, and transmitted to the registry, the matter of the representation came on to be heard before the Dean of Arches, the Right Honourable Lord Penzance. The hearing was commenced on the 4th of January last in the Public Library of Lambeth Palace; it was continued on the 5th and 6th of January.

A. J. Stephens, Q.C., and *B. Shaw* were counsel for the complainants.

Fitzjames Stephen, Q.C., A. Charles, Jeune, and *W. G. F. Phillimore*, for the respondent.

At the commencement of the proceedings his lordship intimated that, in cases coming before the Court under the provisions of the Public Worship Regulation Act, 1874, the practice and procedure, except where it was otherwise provided by the provisions

(1) See *Lee* v. *Fagg*, Law Rep. 6 P. C. 38.

1876

CLIFTON v. RIDSDALE.

of the Act or the rules and orders made in pursuance thereof by Order in Council of the 28th of June, 1875 (1), would be the same as that prevailing in other cases within the jurisdiction of the Court.

On behalf of the complainants the following witnesses were examined:—An architect, who produced drawings he had made of the chancel-screen and the crucifix mentioned in the 11th article of the representation, and of the embossed pictures referred to in the 12th article, and described such pictures (fourteen in number) as being hung on nails round the nave and aisles of the church, and the crucifix as being an integral portion of the chancel-screen; and a newspaper reporter, who had been present in St. Peter's Church during the morning, the mid-day, and the evening service on the 4th of July, 1875, and during the mid-day service on the 11th of July, 1875, and who gave evidence in support of so much of Articles 1 to 7 and Article 9 of the representation as were not admitted by the respondent, and so much of Article 8 as charged the respondent with, on the 7th of July, 1875, unlawfully consecrating and receiving the elements during the celebration of the Lord's Supper, when only one person communicated with him.

Another witness was examined in further support of Articles 4 and 8 of the representation, but such witness failed to prove that the respondent was present in St. Peter's Church, Folkestone, on the 1st of August, 1875, as pleaded in the last-mentioned articles, and, in fact, it appeared that on that day the respondent had been absent abroad, and a substitute appointed by him had officiated at the mid-day Communion Service in his church.

Other witnesses were called, and gave evidence with respect to the placing of the embossed pictures before mentioned in the church, and the erection of the crucifix upon the chancel-screen, as stated in the 11th article. The material result of their evidence appears from the judgment.

The deputy registrar of the diocese of Canterbury produced a faculty granted by the Commissary Court of Canterbury on the 23rd of August, 1870, to the respondent and churchwardens of the said parish for the enlargement and alteration of the church of St. Peter's, Folkestone. Among the alterations authorized by the

(1) Ante, p. 1.

faculty were the following: An alteration of the level of the chancel of the church, and the erection of a dwarf wall, with a screen thereon of light ironwork between the chancel and nave.

The respondent tendered himself as a witness, and was examined. His evidence, so far as material, appears from the judgment. The admissions made by counsel on behalf of the respondent also appear from the judgment.

At the close of the respondent's case his counsel stated that, having regard to the decisions of the Judicial Committee of the Privy Council in *Hebbert* v. *Purchas* (1), and *Martin* v. *Mackonochie* (2), it was not proposed that any argument should be offered by them, except with reference to the charges contained in the 8th, 11th, and 12th articles of the representation. (3)

A. J. Stephens, Q.C., for the complainants. As the respondent has admitted the illegality of kneeling during the reading of the Prayer of Consecration in the Communion Service, and pleads that he has discontinued such kneeling, it is submitted that, with respect to the charges in the 6th article of the representation, the Court should, without any further order, admonish the respondent to refrain from the practice there complained of: *Martin* v. *Mackonochie.* (4)

With respect to the remainder of the representation, it has been conceded that there can be no question before this Court of the unlawfulness of the acts and matters complained of in these portions of it which do not relate to the several charges made against the respondent, 1, of unlawfully administering the Communion when an insufficient number of communicants were present, or, 2, the placing or the setting up in St. Peter's Church, Folkestone, of the crucifix referred to in the 11th article, and the embossed pictures described in Article 12 of the representation. Of these charges, the first, that of "consecrating and receiving the elements when only one person communicated" (Art. 8), has been fully proved as laid, on the 4th of July, and, in fact, is virtually

(1) Law Rep. 3 P. C. 605.

(2) Law Rep. 2 P. C. 365.

(3) See *Martin* v. *Mackonochie*, 2nd suit, Law Rep. 4 A. & E. 279.

(4) Law Rep. 2 A. & E. 116, 209; Law Rep. 2 P. C. 365; Law Rep. 3 P. C. 409.

1876

CLIFTON v. RIDSDALE.

admitted, whilst it is in evidence that on the 1st of August a similar offence was committed, when a substitute appointed by the respondent was the officiating minister. The allegation pleaded in the 4th article of the answer is really immaterial, for it is submitted that it was illegal for the celebrant in the Communion Service to consecrate the elements and receive the Communion unless he had reasonable grounds for believing, and bonâ fide believed, that at least three persons, as to whom he had reason for his belief, would communicate at the same service: *Parnell* v. *Roughton.* (1) The 2nd and 3rd rubrics after the Communion Service contain the whole law on the subject. It is clear that the object of these rubrics was the prevention of what may be called a solitary communion, in many respects analogous to the private masses used in the Roman Catholic Church. This becomes apparent when the language of English theologians writing at the time is considered.

[LORD PENZANCE. In construing these rubrics, which are the law of the Church of England in this matter, and, in fact, as being contained in the Prayer Book, form a portion of the Act of Uniformity, is it competent to the Court to hear the opinion of any writer, however eminent? Are not the rubrics to be construed like any other Act of Parliament? I have never heard that the opinion of even the framers of a statute was admissible for the purpose of interpreting it.]

It has been usual, in construing ecclesiastical statutes, in order to shew the meaning of every word used, which often varied in different reigns, to rely very much on a contemporanea expositio of the statute under discussion.

[LORD PENZANCE. No doubt it is most important that the Court should be in a position to understand the meaning given to any expressions occurring in a statute; but it is going far beyond this to take the opinions of any private person as a means of shewing what the intention of the legislature was.]

Before commencing to read the second of the two portions into which the Communion Service is divided, the respondent was bound to have ascertained that a sufficient number of persons

(1) Law Rep. 6 P. C. 46.

were present and about to communicate with him: *Wynn* v. *Davies* (1); *Priestley* v. *Lamb.* (2)

[LORD PENZANCE. What course is the minister to adopt to ascertain this?]

The rubric before the exhortation in the Communion Service—a rubric which is to be read with the rubrics above referred to: *Parnell* v. *Roughton* (3)—requires that those about to communicate shall be conveniently placed to receive the Communion; and, therefore, before reading the exhortation, the minister is bound to place at least three persons intending to communicate separate and apart from the rest of the congregation. He has thus a certain means afforded him of becoming aware whether the number of persons required by law are about to communicate with him. [He referred to *Martin* v. *Mackonochie.* (4)] Moreover the minister has it in his power, either through the pulpit or the churchwardens, to guard against any neglect of the provisions of the rubric.

With regard to the charge of setting up and maintaining a crucifix on the screen, and lighted candles, as charged in the representation, it must, in the first place, be asked what interest can the parishioners and churchwardens have in articles which can be shewn to be illegal? There is abundant evidence that the candles in question were not required for the purpose of giving light, and as the faculty relied on by the respondent does not specify with sufficient particularity what screen it was intended should be erected, the fact of its having been granted cannot afford any evidence in support of the respondent's case. The complainants contend that it can clearly be shewn that all crucifixes in churches of the Church of England are illegal. The Homilies are especially directed against their use, and the judgment of the Judicial Committee of the Privy Council in the recent case of *Phillpotts* v. *Boyd* (5) in no wise sanctions them. In the case of *Westerton* v. *Liddell* (6) a distinction is drawn between crosses and crucifixes, and their lordships are careful, though allowing the lawfulness of the former when used as archi-

(1) 1 Curteis Rep. 69, 83.
(2) 6 Ves. 421.
(3) Law Rep. 6 P. C. 46.
(4) Law Rep. 2 P C. at p. 383.
(5) Law Rep. 6 P. C. 435, 466.
(6) Moore's Special Rep. 175.

1876

CLIFTON v. RIDSDALE.

tectural ornaments, to say nothing of the legality of the latter. No doubt, to quote the words of Mr. Justice Keating in *Boyd* v. *Phillpotts*, "It is clearly to be gathered from *Westerton* v. *Liddell*, that the Judicial Committee thought a crucifix would be illegal." (1)

At the Hampton Court Conference, in 1603, James I. referred to the material crosses which existed before the Reformation, as demolished; and it is a matter of history, that whenever, in previous reigns, abused images were ordered to be destroyed, the crucifix, an image which certainly had been abused, was not excepted: The Exeter Reredos, *Burch's Case*, revised report, p. 102. Moreover, a crucifix is within the prohibition of 3 & 4 Edw. 6, c. 10, a statute held by the Lords of the Privy Council in *Phillpotts* v. *Boyd* (2) to be still in force, and under its provisions the respondent, by setting up and maintaining a crucifix in his church, has clearly, if any effect at all is to be given to the statute, committed an illegality. By using lighted candles near and about the crucifix the respondent has introduced into his church a ceremony well known in Roman Catholic churches, but unlawful in churches of the Church of England), as being an unauthorized ceremonial act and an unauthorized addition to the services prescribed by the Book of Common Prayer. [He referred to Walcot's Sacred Archæology, voce Rood, p. 512.]

The pictures described in the 12th article of the representation were put up without a faculty, and are obviously placed in the church for no other than superstitious purposes. They are not inert decorations, but are clearly used for purposes of devotion as in Roman Catholic churches; they are superstitious pictures, abused, and likely to be abused, and, since the Reformation, have been entirely unknown in churches of the Church of England. [In support of his argument on this point, he proposed to refer to a book of devotions entitled The Crown of Jesus, stated by him to be published under the sanction of the authorities of the Roman Catholic Church.]

(1) The Exeter Reredos Case, revised report of proceedings before the Visitor, by Arthur Burch, Exeter, 1874, p. 147. [Mr. Burch's report formed the process brought into the registry on the appeal of *Boyd* v. *Phillpotts*, Law Rep. 4 A. & E. 297.]

(2) Law Rep. 6 P. C. 435, 466.

[*Fitzjames Stephen, Q.C.*, objected to any reference to anything not in evidence, and submitted that the customs of the Roman Catholic Church must be proved by an expert.]

[LORD PENZANCE. It is not an uncommon practice in cases in the courts of common law, where a question arises as to the tenets of any religion, for an authenticated book to be cited in argument, the proof of foreign law is different; it must however be remembered that the question now arising is not whether a matter of foreign law has to be proved. I cannot say I ought to refuse to allow a book of authority in the Roman Catholic Church to be referred to, provided that it is shewn that the pictures described in such book are substantially the same as the pictures in St. Peter's Church.]

[*Fitzjames Stephen, Q.C.*. The complainants have not laid any foundation for using the book they wish to refer to. They should, at any rate, call a witness to prove that it is a work of authority. In the case of *Elphinstone* v. *Purchas* (1) the nature of the vestments which the defendant was charged with wearing was proved by an expert.]

[LORD PENZANCE. Some little difficulty may have arisen owing to the course the present case has taken, the facts having been taken before the questions of law were gone into. In the circumstances, I will allow a witness to be called for the purpose of supplying the necessary evidence.]

[In consequence of this permission the counsel for the complainants produced as a witness Domenic Criscitelli, one of the clergy attached to the Roman Catholic church of St. Peter's, Hatton Garden. This witness stated the nature and use of the devotions and pictures known to the members of the Roman Catholic Church as the stations of the cross and passion, and proved that two books, entitled one The Key of Heaven (2), and another, The Crown of Jesus (3)—each containing, under the title of Stations of the Cross and Passion, fourteen delineations, recognised by the witness as representing the same subjects as the

(1) Law Rep. 3 A. & E. 66.

(2) The Key of Heaven; a Manual of Devout Prayer and Pious Exercises, with the Stations of the Holy Way of the Cross. By S. Alphonsus M. Liguori. Dublin: James Duffy, Paternoster Row. A.M.D.G.

(3) The Crown of Jesus. Suffield.

1876

CLIFTON v. RIDSDALE.

drawings produced of the fourteen embossed pictures in the respondent's church, together with certain prayers intended to be repeated before each picture—were approved devotional works allowed by the authorities of the Roman Catholic Church.

The two books in question were then put in evidence, and the counsel for the complainants, continuing the arguments, cited and referred to passages from them for the purpose of shewing that the so-called stations of the cross were in the Roman Catholic Church turned to uses which the Church of England would consider illegal and superstitious, and that the probability was great that the embossed pictures in St. Peter's Church, Folkestone, either were or would be turned to such uses. The most material passages so cited or referred to are to be found at pp. 155, 157, 351, 421, 441, of The Crown of Jesus.]

Of the fourteen pictures referred to in the 12th article of the representation, five, namely, those which have been in effect identified with the stations numbered 3, 4, 6, 7, and 9, in The Crown of Jesus, ought clearly to be removed as illegal. They do not even represent any historical incidents in our Lord's life; and therefore more especially tend to convey erroneous views and to encourage superstitious uses. The same observation applies to the station No. 13] if the explanation of it given in The Crown of Jesus is taken into consideration. The 23rd of the Inquisitions of Queen Elizabeth orders the destruction of all pictures and paintings and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition: Cardwell's Documentary Annals, vol. i., pp. 221, 222; *Westerton* v. *Liddell* (1); and when it is remembered that the stations were first introduced into churches in order that prayers might be said before each in turn, instead of at the actual spots intended to be represented by them, it is evident that they are monuments of pilgrimages. It is also plain that the station No. 6 is a monument of a false, feigned miracle. [He referred to the Catholic Layman, vol. v., and to Fulke's Defence of the Translations of the Bible, Parker edition.]

The question to be decided really is, do those pictures tend to encourage superstitious uses, for if, as the complainants contend,

(1) Moore's Sp. Rep. 163. See *Boyd* v. *Phillpotts*, Law Rep. 4 A. & E. 297.

they have such a tendency, their retention in the respondent's church is clearly against the law: *Phillpotts* v. *Boyd.* (1)

[LORD PENZANCE. I have been endeavouring to ascertain what has been the practice of the Court as to the number of counsel to be heard, and I find that, although it has not been entirely uniform, the usual course has been to hear two counsel on each side; the practice is to hear two counsel on appeals before the Judicial Committee of the Privy Council, and the House of Lords. I think, also, that in laying down a rule of practice which will apply to this case, and to other cases coming before me under the Public Worship Regulation Act, 1874, I ought to keep in view one of the objects of that statute, that it was passed for the purpose of creating a less expensive procedure in cases coming within its provisions. I will hear two counsel on each side.]

Shaw, on the same side. The respondent, in order to succeed in his defence to the charge contained in the 8th article of the representation, ought to have alleged in the answer and proved that he was led to celebrate the Communion on the 4th of July, 1875, by a knowledge of such facts or circumstances as were sufficient to make him or any reasonable man believe that the legal number of persons were about to communicate with him: *Delegal* v. *Highley.* (2) He has not attempted to do this, he has only shewn that a sufficient number of persons were in the church and formed part of the congregation, and that he believed such persons might communicate with him. This is not enough. That the words in the rubric to communicate, mean about to communicate—intending to communicate—is borne out on a consideration of the rubric in the service of the Communion for the Sick requiring that three persons should receive the Communion: That this must be so appears also from the order of the Communion of 1549: Keeling's Liturgies Compared. It cannot be that the minister can set up his ignorance of the number of persons ready to communicate as an excuse for an illegal act, or contend that there is a presumption of law in favour of his proceeding with the Communion Service. Ignorantia juris quod tenetur quisque scire neminem excusat. In fact the minister who officiates is responsible that an illegal Communion

(1) Law Rep. 6 P. C. 435. (2) 3 Bing. N.C. 950.

1876

CLIFTON v. RIDSDALE.

does not take place, and he is authorized and bound at his peril to ascertain that the law is complied with: *Scott* v. *Waithman.* (1)

There is clearly a duty thrown on him analogous to that required from a sheriff in executing the duties of his office. The respondent has not only infringed the rubrics of the Communion Service, but his conduct clearly led to a contravention of the 25th Article of Religion, which declares that the sacraments are not ordained to be gazed upon. Moreover it is evident that if the defence alleged in the 4th article of the answer is a valid one, a solitary Communion would escape all censure.

There is evidence that the crucifix, with lighted candles around it, set up in St. Peter's Church, Folkestone, was placed and retained there for ceremonial purposes; if so, like the veiled crucifix and other things ceremoniously used by the defendant in *Elphinstone* v. *Purchas* (2), it ought to be removed as unlawful. The recent case of *Phillpotts* v. *Boyd* (3) is no authority for the introduction into churches of the Church of England of representations such as the stations of the cross. The sculptures on the reredos in that case represented historical events, and their Lordships of the Privy Council found that the reredos was not likely to be abused, whilst in the present case the representations of historical events not only form one series with those of fictitious events, but it is also quite obvious that the whole series has been, and is liable to be, abused. [He referred to *Westerton* v. *Liddell.* (4)] Apart, however, from the liability of "the stations" to abuse, the common law ecclesiastical prohibits them, as tending to mislead between historical facts vouched for by canonical authority and mere superstitious fables. The stations were clearly not put up in the respondent's church as architectural ornaments or decorations.

Fitzjames Stephen, Q.C., on behalf of the respondent. The respondent had a bonâ fide belief that he was justified in celebrating the Communion in his church on the midday service on the 4th of July, 1875. He expected that several members of his congregation, whom he recognised in the body of the church, and to whom he was accustomed to administer the Communion, would receive the Com-

(1) 3 Stark. 168.
(2) Law Rep. 3 A. & E. 66, 105, 107.
(3) Law Rep. 6 P. C. 435.
(4) Moore's Sp. Rep. 164.

munion on the day in question. The officiating minister would incur grave censure if he refused to celebrate the Communion when more than the requisite number of persons were present in the church and, in his belief, intending to communicate with him. All the congregation present in the church are exhorted to partake of the Communion by the preparatory exhortations which form part of the Communion Service, and it has been held that the rubric requiring previous notice to be given by those who propose to attend is merely directory: *Parnell* v. *Roughton* (1); and that the minister cannot refuse to administer the Communion on the ground of no such notice having been given: *Stewart* v. *Crommelin.* (2)

The rubric directing that there shall be no communion unless three persons communicate with the priest, is only for the purpose of insuring a bonâ fide administration of the Communion. The officiating minister, it is true, is bound to exercise a discretion as to whether the service shall proceed, but when? Evidently at the time when, in accordance with the rubric, he is to place on the communion table sufficient bread and wine; and how can this discretion be exercised unless he is to be guided by past experience, and by seeing how many persons likely to communicate are in the church. No blame can attach to the minister if the spirit of the rubrics is complied with. The respondent exercised his discretion bonâ fide, and the fact that one person did communicate with him shews that that discretion was not quite unfounded. The 25th Article of Religion has been referred to, but that article could only be material in a case where the Communion was celebrated and no person communicated with the priest. The rubrics must receive a reasonable construction. There is nothing in the present Prayer Book to prevent those members of the congregation who wish to do so remaining in the church after the first portion of the Communion Service has been concluded. If then, as is the custom in the respondent's church, the congregation remain to the end of the Communion Service, the officiating minister, unless he takes some unauthorized means of ascertaining the fact—thus incurring grave re-

(1) Law Rep. 6 P. C. 46.

(2) *Stewart* v. *Crommelin*, a Judgment in the Consistorial and Metropolitan Court of Armagh; by the Rev. Alexander Irvin. Hodges & Smith, Dublin; Rivingtons, London, 1852.

1876

CLIFTON v. RIDSDALE.

sponsibility—cannot at the commencement of the second portion of the service be certain of the number of persons about to communicate with him. The complainants contend that the minister has an opportunity of ascertaining who will communicate when the communicants are conveniently placed as directed by the rubric. But this is not so necessarily, for as the language of the Exhortation, and other portions of the Communion Service, enjoin that those who are unworthy should not communicate, it may well be that the number who ultimately receive the Communion may not be the same as those who have been conveniently placed to receive it. Indeed, until the celebrant has himself received the elements, he cannot, except by reasonable expectation, be aware to how many he will have to administer the Communion. The rubric, directing that there shall be no Communion unless three persons communicate with the priest, has no application, except where there are not in the parish twenty persons, at least, of discretion to communicate; whilst the object of that and the preceding rubric is clearly to provide against a celebration when no person communicates with the minister.

With respect to the candles on the chancel-screen, what evidence is there that they were used as a matter of ceremony? only two of them were placed so as to be close to the crucifix, and it has not been proved that any of them were ever lighted except at the evening service, when they evidently were wanted for the purpose of giving light. There has been no decision that a crucifix set up on the chancel-screen, not on, or near to, or part of the furniture of the communion table, is an illegal figure. The respondent admits that it must be considered as established by the decisions in the cases of *Westerton* v. *Liddell* (1) and *Phillpotts* v. *Boyd* (2), that an abused image is unlawful in churches of the Church of England. The crucifix in this case, however, is an architectural portion of the screen on which it stands, and is not an abused image. It is not likely to be abused, has not been abused, and will not be abused, to superstitious uses. The question of the legality of the crucifix was not before the Judicial Committee in *Westerton* v. *Liddell* (3), as in that case their lordships, refusing

(1) Moore's Sp. Rep. (2) Law Rep. 6 P. C. 435, 466.
(3) Moore's Sp. Rep.

to follow Dr. Lushington, who held that the crosses were illegal ornaments, and Dr. Dodson, who considered them images within the prohibition of 3 & 4 Edw. 6, c. 10, really decided nothing more than that crosses, as architectural ornaments, were lawful. Whatever dicta are to be found in the judgment with regard to images or crucifixes are, therefore, merely extra-judicial, and, in fact, seem inconsistent with the principle laid down in that case with respect to the admissibility of architectural decorations.

The effect of the recent decision in *Phillpotts* v. *Boyd* (1) remains to be considered. In that case the question of the lawfulness of images in churches of the Church of England was thoroughly gone into, and it must now be taken as settled law, that not all images in churches of the Church of England are illegal, but only such as are liable to be abused to superstitious uses. It follows, therefore, that a crucifix in stone, set up as an architectural decoration in a parish church, is no more unlawful than the crucifix painted on glass, which, in spite of the attempts made for its removal (*Pierson* v. *Gell* (2)), still remains in the church of St. Margaret's, Westminster (3), and that in fact crosses and crucifixes set up for the purpose of decoration are alike not illegal, and are not prohibited unless it is shewn that they are in some way or other liable to abuse, as for instance by being used as ornaments of the church or treated as subjects of superstitious reverence: *Phillpotts* v. *Boyd.* (4) It therefore follows that the onus of proving the illegality of the crucifix in St. Peter's Church, Folkestone, rests upon the complainants. They however have not succeeded in shewing that any superstitious reverence has been, or is likely to be, paid to it; and if, as the respondent contends, it is a figure meant only for the decoration of the church, the fact that the crucifix has a particular history, and in former times was abused, is really irrelevant; besides, it must not be forgotten, that the proclamations and the injunctions of Edward VI., and Elizabeth, the provisions of which with respect to the destruction of abused crosses and images were much relied

(1) Law Rep. 6 P. C. 435, 466.

(2) Return of Causes before the Delegates, p. 85, No. 171.

(3) See History of the Church of St. Margaret, Westminster; by M. E. C. Walcot, 1851.

(4) Law Rep. 6 P. C. 435, 466.

1876

CLIFTON v. RIDSDALE.

on in former cases, were merely executive acts directed to an evil then existing, and that the statute 3 & 4 Edw. 6, c. 10, is entirely spent.

What has been said with respect to the crucifix applies with equal force to the so-called stations of the cross. The series of pictures called stations of the cross, when considered abstractedly, are clearly innocent, inert, and unused: *Martin* v. *Mackonochie* (1), and the complainants are therefore under the necessity of attempting to prove aliunde that such representations are liable to superstitious uses. There is, however, no suggestion that they have been, or are likely to be, prayed to, or treated with superstitious reverence. Some may dislike, and with good reason, devotional pictures of the character of many of these included in the series; but, appealing as they do only to the imagination, it is no evidence of their unlawfulness that similar pictures are usually to be found in Roman Catholic churches.

A. Charles, on the same side. The respondent had bound himself to administer the Communion in his church at the mid-day service on the 4th of July, 1875, and he could not legally have refused to perform the duty he had taken upon himself unless he was certain that by proceeding with the service he would have committed an illegal act. So long as the first Prayer Book of Edward VI., which contained a direction that after the charitably disposed had "placed their offerings in the poor man's box near the high altar (2), those who desired to partake of the Communion should tarry still in the quire, or some convenient place near the quire, and that all other except the minister and clerks should depart out the quire," was in use, the officiating minister had an evident means of guarding against the possibility of an illegal celebration. (3) The second Prayer Book of Edward VI., containing as it did an exhortation enjoining those of the congregation who were not about to communicate not to be gazers or lookers on of the Communion, but to depart, also, in a modified mode, supplied the required information. In the present Prayer Book, however, as the rubric requiring previous notice is virtually never complied with, and may

(1) Law Rep. 2 P. C. 365, 387.

(2) See the 29th Injunction of Edward VI., Cardwell's Documentary Annals, p. 17.

(3) Liturgies of Edward VI., p. 85, Parker Society, 1844.

be put out of consideration (1), there is to be found no provision for enabling the celebrant to ascertain before consecrating the elements that more than three persons will communicate with him. In these circumstances,—for the rubric directing that the communicants are to be conveniently placed does not necessarily mean that the communicants are to be separated from the rest of the congregation, or to leave the nave or other portion of the church where they had been present during the former portions of the service,—can it be held that an ecclesiastical offence has been committed, when, although reasonable grounds existed for believing that the required number would attend, the number of those who partook of the Communion was in fact less than that required by law? Surely no blame can attach to the respondent if, as has been proved, he acted with good faith and with the discretion of a reasonable man. [He referred to *Campbell* v. *Spotiswoode.* (2)] Again, it is not as if the minister has power to give any notice or direction which might ensure that the rubric as to the number of communicants should be adhered to, for it is clearly unlawful for him to make any unauthorized announcement during divine service, or to make any addition thereto: *Hebbert* v. *Purchas.* (3)

The 11th article of the representation is not so framed as to charge a ceremonial use of the crucifix: *Elphinstone* v. *Purchas.* (4) The only question, therefore, really raised by that article is, whether the crucifix per se is illegal. It cannot be any valid objection that the crucifix in St. Peter's, Folkestone, is placed on the middle of the chancel-screen, for the cross held lawful in the case of *Westerton* v. *Liddell* (5) was in the very same position on the chancel-screen in the church of St. Barnabas, Pimlico. Then, is the crucifix unlawful by reason of disuse or on account of its having been abused in former times? Credence tables and coloured cloths for the communion table were disused, yet they have been held to be legal; and copes, in spite of the decision in *Hebbert* v. *Purchas* (3), are still unused at the Communion Service in some cathedral churches; moreover, the historical fact that during the Common-

(1) See *Parnell* v. *Roughton*, Law Rep. 6 P. C. 46, 51.

(2) 3 B. & S. 769.

(3) Law Rep. 3 P. C. 605, 652.

(4) Law Rep. 3 A. & E. 66, 105.

(5) Moore's Sp. Rep.

1876

CLIFTON v. RIDSDALE.

wealth many crucifixes in churches of the Church of England were destroyed is inconsistent with the argument that they have been disused in England ever since the Reformation. (1)

There is no doubt that the crucifix has been abused, but the same is true of crosses, and crosses, although they have been described as monuments of idolatry and superstition, are not banished from churches of the Church of England as illegal. In fact, arguments derived either from the disuse or abuse of the crucifix, would, even previously to *Phillpotts* v. *Boyd* (2), have been entitled to very little weight; but since that decision it is clear that a new rule has been laid down for testing the legality of images or representations in churches, namely, that any image or representation is lawful unless satisfactory evidence be given that it is in danger of having superstitious reverence paid to it.

No such satisfactory evidence has been given in this case, either with regard to the crucifix, or the stations of the cross in St. Peter's Church. That "the stations of the cross" are the subjects of devotional exercise in Roman Catholic churches ought no more to be considered as evidence of their illegality, when set up for the purposes of decoration, than were averments of the like nature in *Phillpotts* v. *Boyd* (3), where the argument was disregarded that the reredos was an adjunct of the altar in Roman Catholic churches.

A. J. Stephens, Q.C., replied. (4)

Cur. adv. vult.

Feb. 3. LORD PENZANCE. Some misconception, I fear, exists as to the functions, powers, and duties of this Court. Some, also, with regard to the source of its jurisdiction. It is not well that this should be so; for those who, however unadvisedly, question the authority or jurisdiction of a Court, can hardly be expected to yield to its decrees that readiness of obedience in which the true force of all tribunals resides. I think it, therefore, not out of place that, before proceeding to the details of the case before me, I should try to set in their true light some matters that have been

(1) See Wilson, Ornaments of Churches.

(2) Law Rep. 6 P. C. 435.

(3) Law Rep. 6 P. C. at p. 460.

(4) The Court intimated that only one counsel would be heard in reply.

by some unwittingly but grievously distorted, and, in the interests of the many who conscientiously desire to yield obedience to an authority which they perceive to be lawful, to remove the misconceptions set on foot by the very few who may have no desire to submit to any authority at all.

It has been said, and I fear widely accepted, that this Court is a new Court; that its authority is independent of the Church; that the Bishops' Courts, which ought properly to entertain such questions as those now before me, have been by parliament suppressed, and that a lay tribunal has been set up in their place, to sit in judgment not only upon ritual, but on soundness of doctrine and the mysteries of religion. If these things were true, they might afford ground for criticism upon the statute, though they could not affect the duty of obeying it. I hope, however, that those who may be inclined to act upon their truth will be at the pains of reading the statute for themselves. They will then perceive that every one of these four propositions is absolutely incorrect in fact. In the first place, the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85) did not, from one end to the other of it, create any new Court, or indeed any Court whatever. By the 7th section it enacted that a person with certain legal qualifications should be nominated and appointed by the two archbishops, with Her Majesty's approval, to be a "Judge of the Provincial Courts of Canterbury and York." "The provincial courts" here spoken of, are of course the existing provincial courts, namely, what is commonly called the Court of Arches in the southern province, and the Chancery Court in the province of York. At the time the statute passed there were very learned judges presiding in each of these Courts, though they have both since then retired, and the enactment which thus created a new judge to be a judge in both of them, without defining his relation to the existing judges, may be fairly criticised on that score, but is not open to the opposite charge of having created a new Court. This explanation removes also the objection that the courts upon which the powers given by the statute are conferred, are courts independent of the Church, unless, indeed, those who make this objection are willing to contend that the provincial courts of the two archbishops deserve that designation.

1876

CLIFTON v. RIDSDALE.

The next objection, as to the suppression of diocesan courts, is equally incorrect in point of fact. These courts are not named or referred to, directly or indirectly, in the statute; their rights, their powers, and their jurisdiction remain to them, since the Act passed, as they existed before it was passed, untouched and unrestricted. What has really been done by the statute is to confer on the provincial courts (with a more speedy and less costly procedure than heretofore) the right to entertain questions of ritual concurrently with, but not to the exclusion of, the diocesan courts. This jurisdiction is no more than the provincial courts exercised before the statute upon letters of request from the bishop—they may exercise it now without those letters of request; but the necessity for the bishop's assent which is thus withdrawn in one direction is restored in another, for by section 9 of the Act no suit can be carried into this court if "the bishop shall be of opinion that proceedings should not be taken." The provincial courts, therefore, have substantially gained no new jurisdiction by the statute. But if they had, the question I am considering is, not what addition has been made to the powers of the provincial courts, but whether the diocesan courts have been suppressed to make way for another tribunal—and what I have here advanced (which any one may verify for himself on reading the statute) will, I hope, serve to shew that their suppression by this statute is purely imaginary, and contrary to the fact. There may, I dare say, be some to whom the arming of the provincial courts, as courts of concurrent jurisdiction, with a more expeditious and efficient procedure, will appear to be the same thing in substance as suppressing the diocesan courts. To others, on the contrary, it may appear that the rendering a court less likely to be resorted to than before, by bringing another and more effective court into competition with it, is hardly the same thing as suppressing or abolishing it. I have no desire to entertain the question which of these two views is the more correct. Provided that the matter be truly stated and understood according to the fact, and not according to conclusions drawn from the fact, every one can judge for himself, and my end will have been attained.

I am no further concerned with the remaining suggestion, that a lay tribunal has been set up to deal with doctrine as well as ritual,

than to affirm that in all matters of doctrine this Court has now precisely the same jurisdiction, and no more than, it had before the statute was passed: nothing has been added, and nothing taken away.

There are some, I believe, who contend that all questions touching the clergy in their ministrations ought to be referred only to a synod or some other tribunal composed of ecclesiastics. With such a proposition I have nothing here to do, and I will dismiss the subject with the remark that those who assert it must needs go further, and either point out where in the judicature of this country such a tribunal is to be found, or contend that the Church of the State has no laws to govern it, or, what is the same thing, no laws capable of being enforced.

I now address myself to the merits of the present case:—

It is a proceeding taken under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85). Three parishioners of the parish of St. Peter's, Folkestone, have transmitted to the Archbishop of Canterbury a representation under that statute complaining of certain proceedings and matters, which they allege to be unlawful in the conduct of the respondent on the 4th and 11th days of July, 1875. On the 1st day of November, 1875, and after the duties of judge under the statute had become merged in the office of official principal (or Dean of Arches) of the Provincial Court of Canterbury, this representation was transmitted to me, and, consequently, the proceeding before me, by virtue of the 7th section of the Act, became at once a proceeding in the Court of Arches.

The representation complains of many things done by the respondent, which, at the hearing of the case, he did not deny—nor did he deny that these things were unlawful in the present state of the law, as enunciated by the Judicial Committee of the Privy Council, reserving to himself the right to question that state of the law, so far as he may be allowed to do so by that tribunal, should he appeal to it in the present case.

I will shortly enumerate these offences:—

1. The use of lighted candles on the communion table, or on a ledge immediately over it, at the time of the celebration of the Holy Communion, when those candles were not required for giving light.

1876

CLIFTON v. RIDSDALE.

2. The mixing of water with wine for the service of the Holy Communion.

3. The use of wafer bread, instead of bread such as is usually eaten, in the administration of the Holy Communion.

4. Standing at the middle of the west side of the communion table with his back to the people, so that the people could not see him break the bread during the Prayer of Consecration.

5. Kneeling during the Prayer of Consecration—a practice, however, which he says he has since discontinued.

6. Causing the hymn or prayer commonly known as the Agnus Dei to be sung, during the Communion Service, immediately after the Prayer of Consecration.

7. Forming and accompanying a procession, consisting of the choir and two acolytes in short surplices and red cassocks; four banners, a brass instrument, and a processional cross being carried in it; the choir singing a hymn, and the respondent walking in it with a cap called a biretta on his head; such procession taking place after the service of Morning Prayer and immediately before the Communion.

8. Forming and accompanying a like procession on another occasion, when, at one period of it, all those who took part in it fell on their knees and remained kneeling for some time.

The facts of these eight charges having been admitted by or on behalf of the respondent, and the unlawfulness of his conduct on these occasions being unquestioned before me, and, in my opinion, unquestionable, my duty on the present occasion will be confined to admonishing him not to offend again in the same way.

There is one other charge, upon which in like manner no defence has been offered, which requires, I think, some further notice. I allude to the charge of celebrating the Holy Communion in the vestments known by the names of "chasuble" and "alb."

The question of vestments is one which stands in a peculiar position, in respect of the judicial decisions of which it has been the subject. Dr. Lushington, Sir John Dodson, and Sir Robert Phillimore have all held what are called the Edwardian vestments to be lawful.

By the Court of Appeal in *Liddell* v. *Westerton* (1), consisting of

(1) Moore's Sp. Rep.

some of the ablest judges of our time, Lord Cranworth, Lord Wensleydale, Lord Kingsdown, Sir John Patteson, and Mr. Justice Maule, with the late and present Archbishops of Canterbury, it was affirmed in the following words, that "the same dresses and the same utensils or articles which were used under the first Prayer Book of Edward VI. may still be used."

In the case of *Martin* v. *Mackonochie* (1) it was declared generally that the Court "entirely concurred" in the construction of the ornaments rubric in the previous case, and particularly that "the term ornaments in the rubric means those articles the use of which in the services and ministrations of the Church is prescribed by the first Prayer Book of Edward VI." In *Liddell* v. *Westerton* (2), it is right to observe that the Court, in the remarks above quoted, was commenting upon this rubric for the particular purpose, and the particular purpose only, of shewing that it applied to articles and things which were "used" in the service as distinguished from ornaments which were not "used," but "set up in churches as ornaments in the sense of decorations." The terms, therefore, in which their construction of the ornaments rubric was declared, constituted a judicial dictum (very valuable, no doubt, considering the high authority of the judges from whom it emanated), but still a judicial dictum only. But in the later case of *Martin* v. *Mackonochie* (1), the question arose directly whether the lighting of a candle could be justified as the "use" of an ornament permitted by this same "ornaments rubric," upon which the question of vestments turns. It thus became necessary to construe the language of that rubric, and the Court having, as above stated, declared their adherence to the construction given to the rubric in the former case, went on to say that this construction went far to decide the case in hand, and concluded thus: "But the rubric, speaking in 1661, more than one hundred years subsequently, has, for reasons which it is not the province of a judicial tribunal to criticise, *defined the class of ornaments to be retained* by a reference, not to what was in use de facto, or to what was lawful in 1549, but to what was in the church, by authority of Parliament, in that year; and in the parliamentary authority which this committee has

(1) Law Rep. 2 P. C. 365. (2) Moore's Sp. Rep.

1876

CLIFTON v. RIDSDALE.

held, and which their Lordships hold, to be indicated by these words, the ornaments in question are not found to be included." The argument of the Court, therefore, ran thus:—The ornaments which may be lawfully used are defined by the rubric of the present Prayer Book; the meaning of that rubric is, that such "ornaments" may be used as are prescribed by the first Prayer Book of Edward VI.; the use of a lighted candle is not found to be prescribed by the first Book of Edward VI.; therefore, it is not lawful. I can only regard this case, then, as a decision directly based upon the proposition that the rubric of the present Prayer Book defined the "ornaments" which should be lawful in future as those which had been prescribed by the first Prayer Book of Edward VI. No doubt the category of lawful ornaments to be found in the first Book of Edward VI. was appealed to in that case to prohibit a lighted candle as not being within it; it must be invoked by those who uphold the Edwardian vestments as a justification for the use of all vestments which are within it; but it is difficult to conceive that this distinction warrants a different conclusion as to the rubric's meaning. If the directions of the Book of Edward VI. are to be taken as the test of what may be lawfully used under the present Prayer Book, for the purpose of excluding matters and things which are not within them, it may be well urged that they are also the test of legality for the purpose of justifying the use of the things which are within them, and expressly enjoined by them.

When fully considered, therefore, this case affords not a mere judicial dictum, but a direct authority, as to the true meaning of the rubric, judicially announced as the ratio decidendi of the Court, and acted upon as the basis of its ultimate decision.

With this decision the subsequent one of *Hebbert* v. *Purchas* (1), condemning the vestments which are among the "ornaments" prescribed by the first Book of Edward VI., appears to be directly in conflict; but then it must be borne in mind that the case of *Martin* v. *Mackonochie* (2), dealt with things used in the church services (such as a candle), while the case of *Hebbert* v. *Purchas* (1) dealt with the dresses of the ministers, as to which dresses

(1) Law Rep. 3 P. C. 605. (2) Law Rep. 2 P. C. 365.

the canons of A.D. 1603 had given certain directions; and it was to these canons, as I understand the latter case, that the Court ascribed the authority to qualify the subsequent statute and rubric in respect of dresses or vestments.

The only passage which throws any light on the aspect in which the previous decision was regarded by the Court, is the following:—"In *Martin* v. *Mackonochie* (1) the Committee stated anew the substance of the judgment in *Westerton* v. *Liddell* (2) upon this point, but did not take up any new ground." Save in these words, no reference whatever to the case of *Martin* v. *Mackonochie* (1) is made in the judgment in *Hebbert* v. *Purchas.* (3) So brief a notice and summary a dismissal seem rather to favour the conclusion that the case was considered unimportant to the matter in hand than that it was meant to be overruled. It may be, therefore, that this conflict of authorities is rather apparent than real; but, whether it be the one or the other, my course in this Court is clear. I cannot doubt that of two judgments delivered in the Appellate Court, which are in any degree inconsistent, I am bound in pronouncing the decision of the inferior Court to obey and carry out that which was addressed directly to the matter in issue here, and which also was the last pronounced.

As this result was inevitable the learned counsel have done well, I think, not to argue the question, and as the question has not been argued, I forbear to express my own opinion on the subject.

I must therefore hold that Mr. Ridsdale has offended against the law in celebrating the Communion in a chasuble and in an alb, and admonish him to refrain from doing so in future.

If this decision is wrong it must be corrected by the Appellate Court.

I proceed now to deal with the remaining charges, and I will take, first, the charge which relates to the celebration on the 4th of July, 1875, at the service of the Holy Communion commencing at 10.30 a.m., when only one person besides the respondent received it. The fact is not denied. The only answer given is,

(1) Law Rep. 2 P. C. 365. (2) Moore's Sp. Rep.
(3) Law Rep. 3 P. C. 605.

1876

CLIFTON v. RIDSDALE.

that the great bulk of the congregation remained in the church, that there were 200 to 250 people present, and that the respondent had reason to believe, and did believe, that a sufficient number of them would communicate with him. I will examine the correctness of this last assertion presently; but, in the first place, it is desirable to turn to the rubric itself, which is said to have been contravened. It is in these words:—

> And there shall be no celebration of the Lord's Supper, except there be a convenient number to communicate with the priest, according to his discretion. And if there be not above twenty persons in the parish of discretion to receive the Communion; yet there shall be no Communion except four (or three at the least) communicate with the priest.

It cannot, I think, be said that the words of this rubric admit of any but one interpretation—there is to be no Communion unless as many as three persons are present and communicate with the priest. It was not even in argument contended that the rubric meant anything else. It does not say there shall be no communion "unless the priest believes," or "unless he has reasonable ground to believe," that there will be as many as three communicants, but expressly that there shall be no communion "except three at the least" do in fact "communicate with the priest." But it was urged on Mr. Ridsdale's behalf, that his infraction of this rubric was not a wilful or voluntary one, and that on a principle which pervades the administration of all laws, he ought not to be held responsible for what he could not prevent. I must observe that this defence was rather that of his counsel in argument than that which he had urged himself in his "Answer." All that he there says is, that a convenient number of persons were present who might have communicated, and that every opportunity was given to them to do so, studiously omitting to say either that he honestly thought the requisite number would communicate, or that he had no means of knowing whether they would or not. I cannot regard this as otherwise than a very significant and possibly intentional omission.

Still the question remains, whether there was on this occasion, or would be on other occasions, any real impossibility of conforming to the rubric, a proposition which it devolves upon the respondent to establish. This impossibility is said to reside in

the fact that the priest must, according to the several rubrics regulating the administration of the Sacrament, consecrate the elements and receive them himself, before he has any means of knowing whether there will be as many as three persons coming forward to receive them after him. But is this the fact? Neither by any evidence that he has given, nor by any conclusions to be extracted from the rubrics of the Communion Service, does it seem to me to be established that a priest, really desirous of conforming to the rubric, is practically unable to discover whether the celebration he is about to enter upon will be a lawful one or not. On a perusal of the several rubrics as they occur in the Communion Service, it certainly seems to be assumed throughout that the number of those who are about to communicate will be known (or, at least, approximately so) to the priest, and if others are present (the propriety of which is, I believe, a controverted point, but one with which this Court has nothing now to do), discriminated in some manner from them. Thus at the very beginning of the Order for the Administration of the Communion, it is said,—"So many as intend to be partakers of the Holy Communion, shall signify their names to the curate at least some time the day before." Then at a later period of the service, "The priest shall then place on the table so much bread and wine as he shall think sufficient;" and again,—"At the time of the celebration of the Communion, the *communicants being conveniently placed* for the receiving of the Holy Sacrament;" and again,—"Then the priest shall say to *them that come to receive the Holy Communion*;" and again,—"Then shall this General Confession be made in the *name of all them that are minded to receive the Holy Communion.*"

Those, therefore, who intend to receive the Holy Sacrament are invited to give notice of their intention; a quantity of bread and wine is to be placed on the communion table, which is to be estimated in reference to the probable number of them; they are to be conveniently placed "for the receiving of the Holy Sacrament;" and they are to be addressed in the character of communicants by the minister; all of which provisions seem to imply that the minister has some means of distinguishing them. But no precise direction appears to be given as to the details of the

1876

CLIFTON v. RIDSDALE.

manner in which any separation, discrimination, or distinction between those who do and those who do not communicate, is to be brought about.

A reference to the rubrics of the previous Prayer Books may throw some light on the general intention of the legislature on this head.

In the first Prayer Book of Edward VI., at the end of the offertory, stands the rubric following:—

> Then so many as shall be partakers of the Holy Communion, shall tarry still in the quire, or in some convenient place nigh the quire, the men on the one side, and the women on the other side. All other (that mind not to receive the said holy Communion) shall depart out of the quire, except the ministers and clerks. (1)

In the second Book of Edward VI., this rubric desiring the communicants to remain in the quire was omitted, perhaps because the congregation was no longer invited to come into the quire, and deposit their alms in the box which used to stand near the altar, or perhaps because a rubric was then for the first time introduced, directing that the table at the time of the Communion should stand in the body of the church, except in those churches where morning and evening prayer were read in the chancel. But at this same time a further alteration was made by adding the following very strong expressions to the form of exhortation which was to be said "at certain times":—

> And whereas ye offend God so sore in refusing this holy banquet, I admonish, exhort, and beseech you, that unto this unkindness, ye will not add any more. Which thing ye shall do, if ye stand by as gazers and lookers on them that do communicate, and be no partakers of the same yourselves. For what thing can this be accounted else, than a further contempt and unkindness unto God . . . . Wherefore, rather than ye should so, depart you hence, and give place to them that be godly disposed. . . . (2)

This exhortation is looked upon by some, I believe, as addressed only to those who were not in the habit of communicating at all. By others, on the contrary, it is regarded as an invitation to all who are not about to communicate on the particular occasion, to leave the church, and thus separate themselves from the communicants.

But, whatever may have been the intention of it, it is not

(1) The Liturgies of Edward VI., Parker Society ed. 1844, p. 85.

(2) The Liturgies of Edward VI., Parker Society ed. 1844, pp. 272, 273.

unlikely that it gave rise to a custom more or less general for the non-communicants to withdraw. On this matter I will quote a passage from a judgment delivered in the Metropolitan Court of Armagh in the year 1852. The case was cited by Dr. Stephens, and I am indebted to him for a copy of the judgment.

Speaking of this exhortation, the rev. judge of that Court said:—

> This striking address, repeated in all the churches of the kingdom during a period of nearly a hundred years, very effectually brought about and established the custom of the non-communicants withdrawing—a custom that continues to this day, although this part of the exhortation was omitted in the prayer book of 1662.

He then adverts to the fact that the rubric above quoted, as to the commmnicants "being conveniently placed," was for the first time inserted in the present Prayer Book, and goes on thus:—

> When, therefore, the non-communicants have withdrawn, and the communicants have placed themselves conveniently for receiving the Sacrament, that is in a part of the church near the Lord's table, it would seem to be easy for the officiating minister to make a tolerably accurate estimate of the numbers for whom he is to provide a sufficient quantity of bread and wine, even though they have not signified their names previously.

The only other matter which sheds any light on this subject is the language of the twenty-fifth article of religion, which speaks of the Sacrament as not to be carried about or "gazed upon."

Upon this review of the history of these rubrical directions, the conclusions at which I arrive are, that the legislature, in both prayer books of Edward VI., as well as the book of 1662, contemplated that there would be some method of discriminating between those who intended to partake of the Holy Communion and those who did not; that under the first book of Edward VI. the means of doing so were specifically prescribed; that under the second book of Edward VI. and the present book, no such specific means are prescribed (except they be found in the direction that the communicants should be "conveniently placed") and that the custom, however general, of the non-communicants retiring from the church is not specifically enjoined by any positive direction of the existing rubrics. Nor am I aware that the minister has any means at his command to enforce compliance with this custom, supposing it to be desirable to do so, upon which matter it is not

1876

CLIFTON v. RIDSDALE.

my duty here to express an opinion. But admitting this to be so, it was still urged by the complainants that the minister has, practically, other means within his reach of ascertaining whether a sufficient number are about to communicate, did he choose to avail himself of them.

It was not asserted, nor can it be assumed, that the members of the respondent's congregation would do otherwise than assist him in avoiding the celebration of the Sacrament in a manner contrary to the express letter of the law; and it was therefore contended that the respondent had only to make known to his congregation the difficulty in which they placed him by the practice of non-communicants remaining in the church when the celebration of the Holy Sacrament was about to begin, without any separation being effected between them and the communicants, for the difficulty to pass away.

To this it was replied that a clergyman has no means of doing so without violating the rubrical directions, and the judgment in *Westerton* v. *Liddell* (1) was relied upon to shew that the details of the Communion Service could not be added to, or varied, by any announcement on the part of the minister, without infringing the law. Various means were suggested, however, by which it might be done, and either through the churchwardens or through the pulpit, or otherwise, it was said that the minister might make known his desire that if non-communicants chose to remain in the church, the communicants should conveniently place themselves apart from the rest, so as to enable him to recognise them. The most formal method of proceeding in this direction, perhaps, would be for the clergyman to apply to his ordinary, and with his leave to read out during the service a notice describing what those who intended to communicate should do to declare themselves, and thus comply with the rubric, immediately preceding the offertory on the subject of notices to be given in church.

I do not dwell further on this, or pause to decide what the respondent might best have done, because he has in fact done nothing and attempted nothing, and further because I am not even satisfied that he had any reasonable cause to expect that the celebration of the 4th of July would be other than what it actually

(1) Moore's Sp. Rep.

was. It appears, on the respondent's own evidence, that what happened on the 4th of July had happened on several previous occasions; that he had taken no steps to prevent the recurrence of it, and that on leaving his cure in the hands of two other clergymen when he went abroad in August, he gave them no warning or directions, so that the same thing happened again in his absence. The possible difficulties of a position can hardly, therefore, be listened to in exculpation of one who has not been at the pains of ascertaining whether they are real difficulties or not.

But now I turn to the question whether the respondent had reasonable ground to believe, or did even in fact believe, that there would be a sufficient number of communicants on the 4th of July. It is impossible, I think, to read his own evidence on this head and not perceive that he entered upon the celebration of the Holy Sacrament on that day without, as he states it himself on re-examination, "any positive expectation, one way or the other." It is true there were many present as to whom he did not know that they might not communicate, and as to some, he says he thought they might, but he had no belief that they would. Whatever may be said as to whether reasonable grounds for believing that the proper number would communicate existed or not, it is clear, I think, that the respondent must establish that he did in fact believe that they would do so, before he could possibly be in a position to set up any exculpation based on the imperfect state of his own knowledge. This he has failed to do. The rubric has, in my opinion, been violated, and without excuse. It will, therefore, be my duty to admonish the respondent to obey the rubric in future.

The next question for the decision of the Court concerns the lawfulness of the crucifix, and of the paintings called the stations of the cross, which have been set up in St. Peter's Church.

The solution of these questions depends not on any single contested passage of a statute or a rubric to be construed by the Court, but on the general result of the various acts of the Sovereign and the legislature, which go to make up that momentous change in the state religion, and the ecclesiastical laws of the realm, which is known as the Reformation. The field, therefore, over

1876

CLIFTON v. RIDSDALE.

which such an inquiry is capable of being pursued, is an almost unbounded one, but it does not, I think, devolve upon this Court so to pursue it. For the ground has been already travelled by the appellate tribunal in the two cases of *Westerton* v. *Liddell* (1) and *Phillpotts* v. *Boyd* (2), in which all that historical research and able argument could do to elucidate the legal propositions deducible from an inquiry of the kind, was fully and effectually done. I will state in a few sentences, the points decided in these cases so far as they affect the present inquiry. In the case of *Westerton* v. *Liddell* (1) the Court had to pronounce upon the legality of a cross set up in Mr. Liddell's church. And it was decided that although before the Reformation the symbol of the cross had no doubt been put to superstitious uses, "yet that crosses when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, may still lawfully be erected as architectural decorations," and that the wooden cross erected in that particular case "was to be considered a mere architectural ornament."

The Court determined nothing directly as to the legality of a crucifix, but was at great pains throughout the judgment to point out that crosses were to be distinguished from crucifixes, saying that "there was a wide difference between the cross and images of saints, and even, though in a less degree, between a cross and a crucifix," the former of which, they said, had been "used as a symbol of Christianity two or three centuries before either crucifixes or images were introduced."

I must infer therefore that, in the opinion of the Court, as declared in this case of *Westerton* v. *Liddell* (1), the use of the cross was only to be justified when it played the part of a mere architectural ornament, and that the views and arguments upon which that justification was based did not afford the same justification to crucifixes.

In *Phillpotts* v. *Boyd* (2), the Court, in justifying the erection of the Exeter reredos, adhered entirely and very distinctly to the position taken up in the previous case, and pronounced that erection lawful, though it included many sculptured images, on the express ground "that it had been set up for the purpose of

(1) Moore's Sp. Rep. (2) Law Rep. 6 P. C. 435.

5 PD 19
135,

decoration only," declaring that it was "not in danger of being abused," and that "it was not suggested that any superstitious reverence has been or is likely to be paid to any of the figures upon it." These two cases, considered together, afford to this Court a sufficient guide for the principles which it is now bound to apply. All that remains is to apply them. In doing so it is necessary first to have a clear idea of what is meant by "superstitious reverence being paid," and then to ascertain whether such "reverence" is likely to be, or in danger of being, "paid" to the particular objects here complained of, or whether, on the contrary, it is established that those objects are for architectural ornament only. It will be observed that the contrast set up by the Court in these cases, is between superstitious reverence, on the one hand, and architectural decoration on the other; and I cannot but think that the Court considered that all figures in sculpture or painting must needs fall within one category or the other—so that if the objects and figures here in question were intended to be, or were likely to become anything more, or other, than mere architectural decorations, they would be illegal as objects of "superstitious reverence." This view would at once simplify the definition of "superstitious reverence," and reduce the inquiry to the question whether the limits of mere architectural decoration have been exceeded or not. But, passing this by, and considering the matter in a more general light, I conceive that the words "superstitious reverence" or "idolatrous practices," together with the more general term "abuse," all which expressions are used indifferently by the Court in *Phillpotts* v. *Boyd* (1), are intended by the Court to mean the same thing as "worship" and "adoration," which are found in the 22nd Article of Religion. This appears from the following passage in the judgment in that case:—

> As the Reformation proceeded, and the Articles of Religion came to receive statutory authority, the doctrine of the church on this subject was plainly set forth. The 22nd Article of Religion declares that "the Romish doctrine concerning purgatory, pardons, *worshipping*, and *adoration*, as well of images as of reliques, and and also invocation of saints, is a fond thing vainly invented, and grounded upon no warranty of Scripture, but rather repugnant to the Word of God." In other words, it condemns only the "abuse" of images. (2)

What then was this Romish doctrine? The actual worship of

(1) Law Rep. 6 P. C. 435. (2) Law Rep. 6 P. C. at p. 464.

1876

CLIFTON
v.
RIDSDALE.

52 D 135

the graven image in place of the deity it represents, has never, so far as I am aware, been inculcated by the Romish church. It certainly forms no part of the teachings of that church, if I may rely on the testimony produced in this case from the lips of the witness Dominic Criscitelli. The "Romish doctrine" "concerning worshipping and adoration of images," spoken of in the 22nd Article of Religion, as "a fond thing, vainly invented," must therefore be intended in that article to mean the devotion and prayer which the Roman church to this day enjoins its adherents to offer, not to images themselves, but to God, before crucifixes, images, or paintings, and the like. And it was this doctrine, together with the practices which had been found to result from it, which it was a main object of the Reformation to denounce and utterly put away from the reformed church. That I may in no wise mistake or misapprehend the doctrine of the Romish church on this matter, I will refer to the following passage from the decrees of the Council of Trent:—

. . . Imagines porro Christi, deiparæ Virginis, et aliorum sanctorum, in templis præsertim habendas et retinendas, eisque debitum honorem, et venerationem impertiendam; non quod credatur inesse aliqua in iis divinitas, vel virtus, propter quam sint colendæ; vel quod ab eis sit aliquid petendum; vel quod fiducia in imaginibus sit figenda, veluti olim fiebat a gentibus, quæ in idolis spem suam collocabant; sed quoniam honos, qui eis exhibitur, refertur ad prototypa quæ illæ representant; ita ut per imagines quas osculamur, et coram quibus caput aperimus, et procumbimus, Christum adoremus; et sanctos quorum illæ similitudinem gerunt, veneremur—Session XXV.—De Invocatione, veneratione et reliquiis sanctorum et sacris imaginibus. (1)

It was not, therefore, intended in the above decision of the Court of Appeal by the use of the words "superstitious reverence," "adoration," or "worship," to convey only the limited idea of a figure or object itself worshipped like a Pagan idol. On the contrary, I understand these expressions as intended to embrace the far more extended conception of worship, adoration, or reverence paid to the deity in presence of or before those objects or figures. It may not be easy to push definition further than this, and define what it is that in any, or every case, constitutes adoration or worship in presence of an image or figure; nor is it necessary to

(1) Canones et decreta sacrosancti . . . Concilii Tridentini . . . Opera et Studio Judaci Le Plat Sessio XXV., p. 280, Antwerp, 1779.

do so; it is enough for the purpose in hand to say that it must be taken to include all and every form or degree in which the object in question is made to take a place, or play a part, in the devotions which are paid to the Deity before it. It is in this sense, then, that I propose now to inquire whether it can fairly and reasonably be said that the figures complained of are likely to be, or are in danger of being, objects of "worship" or "superstitious reverence." There is no dispute as to what these figures are or where they are placed. There is a screen of open ironwork, some nine feet high, stretching across the church at the entrance to the chancel; the middle portion of this screen rises to a peak, and is surmounted by a crucifix or figure of our Saviour on the cross, in full relief and about eighteen inches long—this is the crucifix complained of. The screen, of course, from its position directly faces the congregation, and the sculptured or moulded figure of our Lord, is turned towards them. There is, further, a row of candles at distances of nearly a foot apart all along the top of the screen, which is continued up the central and rising portion of it, the last candles coming close up to the crucifix on either side, so that when the candles are lighted for the evening service, I should presume that the crucifix would stand in a full light. These candles were proved to have been lighted for the evening service on the 4th of July, 1875; it hardly seems that they were necessary for the purpose of lighting the church at the beginning of the service on that occasion; but, on the other hand, it appears that the gas was necessarily turned on before the service concluded, and I cannot say that it is made out to my satisfaction that the candles were not then wanted for lighting purposes. I may at once then, dispose of the charge which, though not distinctly made in the representation, was urged in argument, that the position of the candles in relation to the crucifix and the manner in which they were used, together constituted a ceremonial observance, and as such were not warranted by law. I hold that this charge is not made out, and I pass to the more serious consideration, whether a crucifix so placed and lighted is in danger of being an object of "superstitious reverence." The best forecast of the future in most cases, but especially in those wherein the weaknesses and failings of mankind are concerned, is to be obtained from the experience of the past.

1876

CLIFTON v. RIDSDALE.

And it was to the past that the Court in *Phillpotts* v. *Boyd* (1) emphatically appealed in justification of the Exeter reredos. In speaking of "painted representations of portions of sacred history, to be found in many of our churches," the Court relied upon the circumstance that these paintings "had been proved by long experience to be capable of remaining there without giving occasion to any idolatrous or superstitious practices." Would an appeal to the experience of the past, in the case of crucifixes, bring out the same result?—or rather, it should perhaps be asked, would not the result be the very opposite? It is precisely here that, to my mind, the great difficulty presents itself in the proposal now made to sanction the restoration of so well known an object as the crucifix to that place in our churches to which for 300 years it has been a stranger.

The crucifix, as set up in our churches, has a special history of its own. Before the Reformation, the "rood" was ordinarily to be found in parish churches in this country. It presented the carved, sculptured, moulded, or painted figure of Jesus Christ on the cross, and was, in fact, "a crucifix, with images at the base." (2) This figure was erected on a structure called the rood loft, which appears to have traversed the church at the entrance to the chancel; in fact, it occupied as nearly as may be the position which the iron screen in the present case does.

There is in existence the most precise and unquestionable evidence on this matter, and it is to be found in the records of the Lincolnshire parishes, printed in Mr. Peacock's book on Church Furniture, and dated A.D. 1565–6. So universal does the existence of the "rood" in some form, either sculptured or painted, seem to have been, that in these returns of the churchwardens of upwards of 150 parishes, there is mention of the rood as having been defaced or pulled down in at least 140. It will also be found that in Bonner's Articles, put forth during the reign of Queen Mary, in the year A.D. 1554 (3), inquiry is made "whether there be a crucifix, a rood loft, as in times past has been accustomed; and if not, where the crucifix or rood loft is become, and by whose negligence the thing want."

(1) Law Rep. 6 P. C. 435. (2) See Perry's Lawful Church Ornaments, p. 247.
(3) See Card. Doc. Ann. vol. i. p. 152.

Again, in Cardinal Pole's Articles, A.D. 1557 (1), " . . . whether they have a rood in their church of a decent stature, with Mary and John, . . ." After this period, the historical evidence abounds that in the reign of Elizabeth these roods and rood lofts were destroyed far and wide, as monuments of idolatry and superstition, but I am not at present concerned with that circumstance, save so far as it serves to shew that they had existed, and were of general if not universal occurrence. Not only so, but in the year 1560, a discussion appears to have arisen as to the propriety of setting the roods or crucifixes up again in parish churches. In the Zurich Letters, first series, p. 67, is a letter by Bishop Jewel, dated the 4th of February, 1560, in which he says:—

> This controversy about the crucifix is now at its height. . . . A disputation upon this subject will take place to-morrow. . . . For matters are come to that pass, that either the crosses of silver and tin, which we have everywhere broken in pieces, must be restored, or our bishoprics relinquished.

In the same series, at pages 73–74, dated the 1st of April, in the same year, is a letter of Bishop Sandys, in which is the following passage:—

> We had not long since a controversy respecting images. The Queen's Majesty considered it not contrary to the Word of God, nay, rather for the advantage of the church, that the image of Christ crucified, together with Mary and John, should be placed, as heretofore, in some conspicuous part of the church, where they might more readily be seen by all the people. Some of us thought far otherwise, and more especially as all images of every kind were, at our last visitation, not only taken down, but also burnt, and that too by public authority; and because the *ignorant and superstitious multitude are in the habit of paying adoration to this idol above all others.* * * * * * God . . . delivered the Church of England from stumbling blocks of this kind.

From all this it is plain that the crucifix formed an ordinary feature in the parish church before the Reformation; and it cannot be doubted that it did so, not as a mere architectural ornament, but as an object of reverence and adoration. If any proof was required of this proposition, it may be found in the fact that the worship of it was enjoined in the Sarum Use, the missal most largely accepted and used in England before the Reformation. This was especially the case on Palm Sunday. In the order of service for that day, given in the Sarum Missal, a very elaborate

(1) Card. Doc. Ann. vol. i. p. 206.

1876

CLIFTON v. RIDSDALE.

service ended with the adoration of the "rood" by the celebrant and choir, before passing into the chancel. (1) Such is, most briefly, the part played by the "rood" or crucifix in English churches in the past. If set up again in them now, what part is it likely to play in the future? It is no doubt easy to say, What proof is there of danger of idolatry now? What facts are there to point to a probability of "abuse"?

But when the Court is dealing with a well-known sacred object —an object enjoined and put up by authority in all the churches of England before the Reformation, in a particular part of the church, and for the particular purpose of "adoration"—when the Court finds that the same object, both in the church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that, now, after a lapse of 300 years, it is suddenly proposed to set up again this same object in the same part of the church as an architectural ornament only—it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in "decoration" may end in "idolatry." If this apprehension is a just and reasonable one, then there exists that likelihood and danger of "superstitious reverence" which the Privy Council, in *Phillpotts* v. *Boyd* (2), pronounced to be fatal to the lawfulness of all images and figures set up in a church. Before concluding that it is so, let me pass in review the arguments urged in favour of the opposite side of the question. I will place, first, among them the consideration, forcibly pressed on the Court, that the times we live in are not as the times before or at the period of the Reformation; that images and figures which gave occasion then "for unhealthy minds" to abuse, "we, in our more extended knowledge, may be permitted to use with safety." That there is a wide difference in the state of knowledge, and still more in the degree of its general diffusion, between the 19th and the 16th centuries will not be denied; but is it equally certain that superstition has waned in proportion as the light of intellectual culture has advanced, and that the ground gained by the one has been lost by the other? Is it really so absurd, as it was argued to be, to imagine that in the present day the worship of

(1) See Rock's Church of our Fathers, vol. ii. p. 229. Sarum Missal, Burntisland ed. A.D. 1861, p. 262.

(2) Law Rep. 6 P. C. 435.

lifeless images and figures, not as idols, perhaps, but as aids to devotion, should again prevail as in old times? The fear that it should be so may be unfounded, but I question whether intellectual culture can be relied upon as a safeguard against it; for, if so, what is to be said of the Romish church and of those able and distinguished men who, in our own day, have not hesitated to join it and accept its doctrines. What I am here discussing, I must again repeat, is not the belief in an idol of wood or stone, but the practice of involving in devotional exercises outward and visible forms, as inculcated in the devotional books of the Roman Catholic creed. This is the "fond thing vainly invented" of the 22nd Article of Religion; and the mere fact of the existence of such a doctrine in that church, among whose members high intellectual power and acquirement is rife, is, to my mind, a conclusive answer to the suggestion that the intellect or knowledge of the present day may be relied upon to take the place of those safeguards which it was the work of the Reformation to establish. But another consideration must not be lost sight of. If the intelligent and the cultivated no longer need the protection of old days, can the same be said of the weak and ignorant? The parish church is for all—not for a class—and if the crucifix, placed as it is in this instance, is lawful for St. Peter's church, it is lawful for every parish church in the country, and may be provided for every congregation—strong-minded or weak—instructed or ignorant. Let it be considered to what such a state of things as that would be likely to lead. If devotion to our Lord comes to be habitually paid immediately before a sculptured figure of His body on the cross, which arrests the eye and occupies the imagination while the mind is in attitude of prayer, it may be easy to some, and possible to many, but hardly possible to all, to wholly dissociate the outward object from the inward prayer, and exclude it from playing any part in that devotion. The immediate presence before the eye of an outward form or object proffers an assistance, though of a spurious kind, towards fixing wavering thoughts, and exalting religious fervour, which can hardly be rejected by those who most feel the want of it, and to whom all abstract thought is a difficult exercise. When there cease to be any such, the peril may cease also; but, until then, it is impossible, I think, to accept the alleged

1876

CLIFTON v. RIDSDALE.

robust temper of the present times as a safeguard against so obvious a temptation.

Another argument urged for the respondent was this, that crosses had been as much abused and worshipped before the Reformation as crucifixes, and are therefore as much in danger of abuse now, and yet crosses were by the Court, in *Westerton* v. *Liddell* (1), held not to be unlawful as ornaments. I will only say on this head of argument that the Court in that case were of a contrary opinion; that for reasons which they considered sufficient, they distinguished crucifixes from crosses in this respect, and that if they had been unable to do so, there is nothing to shew that, in their judgment, either crosses or crucifixes would have been lawful ornaments.

A further objection was then taken that, if the delineation of the crucifixion in sculpture may not be lawfully set up in a church, the same thing must be equally true of a picture in a painted window, exhibiting a similar figure. It is not to be doubted that, in many churches (and in the notable instance of St. Margaret's Church, at Westminster, where the window is of great age), representations of the crucifixion in painted glass or paintings are to be found, and I am not prepared to offer any definition which should draw a sharp line of distinction between such decorations and a crucifix. Indeed, I doubt whether any narrower or more exact definition of what is lawful and what unlawful, can, for practical purposes, be framed, than that which is set forth in the case of *Phillpotts* v. *Boyd*. (2) But, adhering to that decision, and each case standing on its own circumstances, it is, I think, to be presumed that the Court of Appeal would not hesitate to adjudge even painted windows, or paintings portraying the same subject, to be unlawful if it was satisfied from the mode in which the subject was treated, the place which they occupied, or other the incidents in surrounding circumstances, that they were in real danger of adoration, worship, or superstitious reverence. So long as they are free from this charge, and fulfil no other function but that of fitly decorating the church, they are free from objection—the moment that, from any cause, whether residing in the objects themselves, or arising among those who worship in the church,

(1) Moore's Sp. Rep. (2) Law Rep. 6 P. C. 435.

the danger of their adoration is made manifest, I conceive that they cease to be innocent, and fall under the charge of illegality.

Up to this point I have considered only the reasons which lead to a conclusion that this crucifix is likely to invite "superstitious reverence." I will now say a few words on the alternative proposition, that it is intended only, and is likely to serve only, as an architectural decoration. Viewing the matter in this light, the remark naturally arises that this particular figure of the crucifix, while it may be justly said to stand highest among the representatives of gospel history in its fitness for the purposes of adoration or worship, must surely be admitted to occupy a very inferior place among the subjects adapted for the display of mere architectural beauty. In association with other figures, and as embodying the scene of the crucifixion, it has no doubt been the subject of artistic treatment; but by itself, as it appears here in this church, standing alone, without incidents or adjuncts, it is a subject which, however artistically treated, might be so well spared in the mere decoration of churches, that it is not easy to conceive that it should be selected solely for that purpose. Upon the whole, then, I must declare that the crucifix surmounting the screen, in this case, has not been shewn, to my satisfaction, to have been set up as an architectural decoration only, and that there does exist a danger and a likelihood that it may be the object of "adoration" and "superstitious reverence." This conclusion makes it unnecessary to consider whether its erection was originally covered by the faculty which was obtained for the iron screen; and the Court must now order it to be removed; but a removal of the figure leaving the cross standing, will be a compliance with this order.

Post 38

It remains to deal with the "stations of the cross." They are described in the representation as "figures in coloured relief of a plastic material, attached to the walls of the church, purporting to represent scenes of our Lord's passion, and such as are commonly used in Roman Catholic churches." It was not denied that this general description of them is a correct one. More particularly, they are a set of fourteen separate groups, affecting to delineate the sufferings of our Lord, commencing with His judgment and condemnation, and ending with His crucifixion and burial. The

1876

CLIFTON v. RIDSDALE.

first objection taken to them I must hold to be a fatal one, namely —that they constitute "an addition to the fabric ornaments or furniture of the church" within the meaning of the statute, and have been set up in the church by the respondent "without lawful authority," no faculty having been either granted or applied for to justify their erection. The law which requires that those who wish to fix or set up any new decoration in a church must apply to the proper authorities for a faculty before they do so, is very salutary and ought to be upheld. It serves as a safeguard against the introduction of many objectionable things into the church, which apathy or want of vigilance on the part of the parishioners might, in many instances, facilitate, and it maintains the principle, which is a wholesome one, that the structure and ornament of the church is not to be meddled with except upon due consideration and lawful authority. It is upon this ground, therefore, that I shall order their removal. But the representation further alleges that they are "decorations forbidden by law," and as they now stand I think they are. It is needless to enter into the history of this set of pictures. Whatever origin they or some of them had, it is clear that the three falls of Christ under the cross, and the legend of S. Véronique, have no warrant in gospel history.

It is also clearly established by the two devotional books put in evidence, The Crown of Jesus, published under the authority of Cardinal Wiseman and four Roman Catholic archbishops in Ireland; and the Key of Heaven, by S. Alphonsus Liguori; that these fourteen representations are to the present day authorized objects of adoration in that church. In the Crown of Jesus, p. 421, the following instruction appears:—

Devotion to the passion of our Lord is a singular special means of grace. The great means of impressing this devotion profoundly on the soul is the holy mass, the holy rosary, and the stations of the cross. You should endeavour to make the stations of the cross every week. The church encourages this practice by the greatest indulgences. Every time that in a state of grace you go round the stations of the cross, kneeling before each (or if the crowd be great, simply turning and kneeling towards each), and with a truly contrite heart meditate on each stage of our Lord's passion, as represented in the "Via Crucis," you have it in your power even without communion, and without any additional special prayers, to obtain several plenary indulgences for yourself, as also for the poor souls in purgatory. * * * In making the following stations, the same indul-

gences are gained as if they were made at Jerusalem, on the very spot where our Saviour suffered.

Then there follow a set of prayers for each station, with direction at what part of them the worshipper is to kneel.

These extracts sufficiently shew the character and objects of the pictures in question, as used among Roman Catholics; the respondent puts them up in a church of the Church of England, and asks the Court to say that they are architectural decorations only, and of a lawful character. I think they are neither. Some of them, if they stood alone, dissociated from the rest, such, for instance, as the Judgment of Pilate, may be unobjectionable in themselves, whilst others, such as the three falls of Christ under the cross, and the fable of S. Véronique, whether they stand alone or not, may well be held objectionable in themselves; but the entire set, viewed as a whole, and in their relation to their well-known history, must be regarded, I think, as likely (if not intended) to be used for the purposes for which they always have been used, and not for the mere purpose of decorating the church. I shall, therefore, as I have above said, order their removal, leaving it open to the respondent, if he shall desire it, to apply for a faculty to authorize the introduction into his church of such of them as may turn out to be free from objection. It will be observed that, in dealing with the question of lawfulness, both as regards these stations of the cross and the crucifix, I have hitherto excluded from view all conclusions to be drawn from the manner in which the respondent has been in the habit of conducting the services of his church.

At the same time it is obvious enough that the probability of both the crucifix and the stations of the cross being turned to superstitious uses, is largely augmented by the fact that they have been set up by a clergyman who celebrates the holy communion with a mixed chalice and wafer bread, and, with a "biretta" on his head, accompanies a procession round his church with banners, crosses, and acolytes in red cassocks, in apparent imitation of the Church of Rome.

But the structure or ornament of a church is more or less a thing of permanence, while the ministrations of a particular clergyman are more or less temporary, and if sound objections

1876

CLIFTON v. RIDSDALE.

exist, as I think they do in this case, to the objects complained of, in themselves, those objections constitute the best, because the most permanent, basis for their condemnation and removal.

I will only add that I have endeavoured, in the above conclusions, rightly to interpret and apply the decisions of the Appellate Court on this grave subject, in their spirit as well as their letter.

I say grave subject, for no one can doubt that the slightest return to the use of graven images or pictures as an aid to prayer or a spur to devotion, would be justly regarded as a surrender of principles, vindicated at high cost in the Reformation, and dear to the people of this country.

On the other hand, it would be a matter of no small concern if any needless restriction or prudery of apprehension should serve to check the generous piety of those who have laboured to restore what the hand of time had defaced; to undo the work of Puritan excess; to repair the ravages of neglect; and enhance the outward beauty of the house of God.

It is between these alternative evils that the decisions of the Appellate Court appear to me to be designed to occupy a safe position.

It may be that, in some cases, the line of severance between the "mere decoration" which is free from harm and the "superstitious reverence" which is full of peril may be difficult to draw or uncertain to maintain. I do not think it is so in this case; but if I deceive myself in that belief there remains the obvious reflection that a false step in one direction is likely to be fraught with evils far greater than any that can ensue from an error committed in the other.

If sculptured figures, or pictures, are once set up in our churches, and sustained by the law, to which (whether from the natural tendencies and weaknesses of the human mind on this subject, or from the teachings of books, or the promptings of individuals), adoration or superstitious reverence should, contrary to expectation, come to be paid, an irreparable step towards idolatry may prove to have been taken; for the outward object once sanctioned, the inward devotion is beyond the reach of laws.

In the opposite direction I can discern no evil comparable to this.

The range of decoration and artistic design is practically without a limit, and in the profusion of choice the loss by prohibition of any special figures or objects can at no time be more than faintly felt, and can at all times be easily repaired.

As the judgment of the Court is on all the charges in favour of the complainants, the respondent must pay the costs of these proceedings.

The material portions of the decree, so far as related to the charges contained in the 2nd, 4th, 5th, and 11th articles of the representation, were, as entered in the registry, as follows :—

Post 384
7 App Cas
242

The judge having maturely deliberated, decreed that the complainants had sufficiently proved the practices, acts, matters, and things alleged in the representation transmitted and filed on their behalf in this court; and that the Rev. C. J. Ridsdale, the party complained of, hath offended against the statutes, laws, constitution, and canons of the Church of England in respect of the following practices, acts, matters, and things: to wit, by having on Sunday, the 4th of July, 1875, at the early service commencing at 7 a.m., and again at the mid-day service commencing at 10.30 a.m., and also on Sunday the 11th of July, 1875, at the like mid-day service, when officiating in his said church in the Communion Service and in the administration of the Communion, unlawfully worn certain unlawful ecclesiastical vestments, to wit, a vestment known as an alb, and a vestment known as a chasuble; and also by having, at all the said services on the said days, when officiating in his said church in the Communion Service and in the administration of the Communion to communicants, used in such service and administration wafer bread or wafers (to wit, bread or flour made in the form of circular wafers), instead of bread such as is usual to be eaten; and also by having, at the said mid-day services commencing at 10.30 a.m., on the said 4th of July, and on the said 11th of July, when officiating in his said church in the Communion Service, unlawfully stood while saying the Prayer of Consecration in the said service at the middle of the west side of the communion table (such communion table then standing against the east wall with its shorter sides against the north and south) in such wise that during the whole time of his saying the said prayer he was between the people and the communion table with his back to the people, so that the people could not see him break the bread or take the cup into his hand; and also by having, without lawful authority, and unlawfully, and since the consecration of the said church, that is to say, in the year 1872, set up and placed upon the top of the screen separating the chancel of the said church from the body or nave thereof, and still unlawfully retaining thereon, a crucifix.

And the said judge by his said decree and judgment admonished the said Rev. Charles Joseph Ridsdale to abstain for the future from any such practices, acts, matters, and things as aforesaid, and from each and every of them, and from sanctioning or permitting and suffering the same or any of them. And the said

1876

CLIFTON v. RIDSDALE.

judge also admonished and ordered the said Reverend C. J. Ridsdale, within twenty-one days from the service of the monition to be issued in accordance with this present decree and judgment, to remove or cause to be removed from his said church the said crucifix placed on the top of the said screen in such church. And the said judge ordered that a monition should issue in accordance with this present decree or judgment, and in respect of all the matters hereinbefore mentioned on the application of the complainants, and on the delivery of a præcipe for the same, and condemned the said Reverend C. J. Ridsdale in costs.

From so much of the decree as is above set forth, and as related to the charges in the said 2nd, 4th, 5th, and 11th articles, the respondent appealed to the Queen in Council. The notice of appeal, which was dated the 16th of February, 1876, was lodged in the registry on the 19th of February, and a monition in accordance with the decree issued out of the registry under the seal of the court, and was, on the 24th of February, served on the respondent. On the same day the proctor for the respondent took out a summons calling upon the complainants to shew cause why the execution of the monition should not be suspended in respect of four points, viz. the eastward position of the celebrant at the Holy Communion, the distinctive vestments worn by the respondent at the said service, bread to be used thereat, and the illegality of the crucifix, on which points the respondent had appealed, pending and until the said appeal had been heard and determined.

Feb. 26. *W. G. F. Phillimore*, on behalf of the respondent, moved the Dean of Arches to suspend the execution of the monition, in respect of the four points appealed, pending the appeal. He referred to s. 9 of the Public Worship Regulation Act, 1874, and rule 24 of the Order in Council relating to that Act. (1)

Shaw opposed the motion on behalf of the complainants, and referred to *Walford* v. *Walford*. (2)

Post 385.

LORD PENZANCE. I must say I think it would be a great misfortune if I were bound by any view of the justice of this case to concede this application. One of the evils that existed before the late Act was the grievance that, when the Court of Arches had decided the thing to be lawful or unlawful, appeal was had to the Queen in Council, and the immediate effect of that appeal was to

(1) Ante, p. 8. (2) Law Rep. 3 Ch. 812.

stay the hand of the inferior Court, so that the decisions of the Court never could have any effect until a great length of time had elapsed, and until very great expense had been incurred. Reference has been had to what happens in other Courts. It is now, as Mr. Shaw has very properly said, under the Judicature Act, the universal practice in all the Courts that the Court appealed from should be able to hold its hand over the circumstances under which the appeal should go on, and that it should have the discretion to suspend the operation of its own judgment or decree in proper cases, but that where such circumstances do not exist as to render it a proper case for that suspension, the rule should be that the decree of the inferior Court should go forward. That was the practice in the Probate Court under the Probate Act, it was the practice of the Courts of equity, and in some cases it was the practice of the Courts of law, but now, by the Judicature Acts, it is the practice of all the Courts in Westminster Hall. To that extent the analogy of other Courts is a thing to look to. But the circumstances under which other Courts think it right to stay the execution of the decree of the inferior Court will be of very little assistance to this Court, owing to the very different nature of the matters involved. Therefore I do not hold with the proposition that because Courts of equity lay down the rule—if they do lay it down—that irreparable injury must be done before they will stay the decree, that this Court should take the same principle as its guide. I think that the principle, and the only principle, if it can be called a principle, which is to be adopted is that the Court in each case should consider the whole of the circumstances, the amount of actual injury, the amount of grievance to people's feelings, the circumstances under which the alleged offence has been committed, the state of the law in previous cases, and a variety of other circumstances, in fact every circumstance that could bear upon the matter—that the Court should take all that into its consideration and then, if special grounds are shewn to exist, that it should hold its hand until the superior Court has had cognizance of the case. That, I believe, is the only principle which can be laid down for the exercise of the power confided to this Court by the late Act of Parliament.

Then the question is, whether in this case any special grounds

1876

CLIFTON v. RIDSDALE.

have been shewn. The respondent in the present case has been in the habit of conducting the services of his church in direct contravention of the law as settled by the Supreme Tribunal in the last case that came before it. I do not know whether I may assume, from his appealing only in respect to certain points, that he is prepared to yield obedience to the law upon those points as to which he has not appealed, I hope I may; but in the cases in which he has appealed he now asks upon no special grounds,—except that he still maintains that these matters are not illegal, which is a proposition that everybody maintains in such cases,—upon no special grounds he asks that he should be allowed to continue the services in a way which the Supreme Court of Appeal has declared to be illegal, until he can have the opportunity, if the Court permits him that opportunity, of questioning again in that Court its own decision and inducing it to revoke the conclusion at which it previously arrived. Now that seems to me a very unreasonable thing to ask. I think he should obey the law as it stands. I think he should perform the services of the Church as the Supreme Court of Appeal has declared they ought to be performed, and then he will come with clean hands at least to the Superior Court, saying, I have been obedient to the law up to the present time and I ask you to allow me to open the question again which you have previously decided, and to endeavour to persuade you if I can that you on a former occasion came to a wrong decision. That applies to three of the four points upon which alone an appeal is granted.

The fourth point is as to a decision of this Court of a novel character relating to a point which has not been decided before. Now upon that matter I will say this, that I think this Court, like all inferior Courts, ought not by any means to assume that its own judgment will ultimately be affirmed, and therefore if any decision is given in this Court upon which an order issued which may be very painful to the consciences of those against whom it is directed, I can conceive cases in which it would be very proper indeed that that order should be withheld, or its operation suspended until the Superior Court had had an opportunity of declaring whether it was justified or not; but in this case I can conceive no difficulty of that kind, because the order here is to take off

from the crucifix the figure which, as has been very properly pointed out by counsel, was proved in the case not to be a part of the same structure as the cross, but to have been distinct from it, and screwed upon the cross; it therefore can be detached without the slightest difficulty, it also can be detached and removed without doing injury to the religious feelings, scruples, or consciences of anybody; because we must always recollect that the respondent maintains that this figure is a mere architectural decoration, and if it is only a decoration of the church, the loss of that decoration for the period during which this case is under appeal is not a matter that really could wound the most sensitive conscience. Viewing this figure, therefore, in the light in which the respondent views it, it seems to me that there is no pretence for applying to the Court on any special ground as to the injury that would be done to people's feelings, or to the structure of the Church, by the removal of the figure, until the Court of Appeal shall have determined, if it does determine, that it may lawfully be put up again.

Therefore, going through the items of the respondent's appeal, looking at the circumstances in which they stand, looking particularly to the state of the law as it now is settled by the supreme tribunal in these matters, and not throwing aside or being unaware of the strong feeling that exists upon many of these subjects, I still think it plain that the respondent ought to obey the law as he now finds it, and that, until he can succeed in reversing it he ought to be content to conduct the services of the church in accordance with the judgment that the Privy Council have already delivered. The power confided to this Court under the section of the Act to which allusion has been made (1), is one that ought to be sparingly applied—it is one that ought to be applied only where very special circumstances exist, and as, in my opinion, no such circumstances exist in this case, I must reject the application. The application is rejected with costs.

Proctors for complainants: *Moore & Currey.*

Proctor for respondent: *Brooks.*

(1) 37 & 38 Vict. c. 85, s. 9.

1876
June 13.

THE CATTERINA CHIAZZARE. (S. 162.)

Damage—Lis alibi pendens—Court of Admiralty of Ireland—Stay of Proceedings—Dismissal of Action.

A collision occurred on the high seas between two vessels, the *H. W.* and the *C. C.*, and to recover for the damage sustained therein the owner of the *H. W.* instituted a cause of damage in rem in the High Court of Admiralty of Ireland against the *C. C.*, and caused her to be arrested in Ireland. The owners of the *C. C.* obtained the release of the vessel on bail, and instituted a cross suit against the *H. W.* Subsequently the *C. C.* came to England, and was there arrested in an Admiralty action in rem at the suit of the owner of the *H. W.*, who claimed in such action to recover damages in respect of the same collision. Whilst the proceedings in Ireland were still pending, the owners of the *C. C.* applied that the action in this court should be dismissed with costs:—

The Court ordered the vessel to be released, and all proceedings in the action to be stayed.

On the 19th of December last the Italian barque *Catterina Chiazzare* came into collision with the brigantine *Harriett Williams*, near Roches point, in Ireland, and for the recovery of damage sustained in the collision, the owner of the *Harriett Williams*, on the 20th of December, instituted, in the High Court of Admiralty of Ireland, an action of damage in rem against the *Catterina Chiazzare* in the sum of 900*l.*

The *Catterina Chiazzare* was arrested in this action by warrant, under the seal of the High Court of Ireland, on the 21st of December, at Cork, but, an appearance in the suit having been entered for the owner of the *Catterina Chiazzare*, and a bail bond given on his behalf, was, on the 31st of December, released from arrest. A cross action of damage in rem had, on the 23rd of December, been instituted in the High Court of Admiralty of Ireland on behalf of the owner of the *Catterina Chiazzare* against the *Harriett Williams*. Subsequently, on the 26th of January, 1876, the owner of the *Harriett Williams* instituted an Admiralty action in rem, in the High Court of Justice in England, against the *Catterina Chiazzare*, in the sum of 1000*l.*, and claimed to recover therein damages occasioned by a collision with the *Catterina Chiazzare* on the 19th of December, 1875, being the same collision in respect of which he had taken proceedings in rem in the High Court of Admiralty of Ireland as stated above.

After being released from the arrest of the High Court of Admiralty of Ireland, the *Catterina Chiazzare* sailed to Liverpool, and was, on the 27th of January, arrested at that port by the marshal of the High Court of Admiralty of England. Thereupon, on the 28th of February, an appearance under protest was entered in the action by the owner of the *Catterina Chiazzare,* and his solicitor filed in the London registry of the Admiralty Division a notice of motion, to the effect that the judge in court would be moved to dismiss the action and to condemn the plaintiff in costs.

In support of the motion an affidavit was filed, in which the solicitor in Ireland, for the owner of the *Catterina Chiazzare,* after a statement of the occurrence of the collision, the institution of a cause and cross cause of damage in rem in the High Court of Admiralty of Ireland for the recovery of the damage arising therefrom, and the subsequent release of the *Catterina Chiazzare* from the arrest of that Court on bail, further deposed, inter alia, as follows:—

The aforesaid actions and cross action are still outstanding and pending in the said High Court of Admiralty of Ireland, and the owner of the *Catterina Chiazzare* is desirous that the proceedings therein should be taken to judgment and conclusion in the said High Court of Admiralty of Ireland.

The High Court of Admiralty of Ireland is a Court of competent jurisdiction to hear and determine the said action and cross action. The owner of the *Catterina Chiazzare* is advised that in actions in rem brought between the same parties and for the same cause of action in two different courts, having co-ordinate jurisdiction, the Court which has possession of the case when the second action is commenced, and has powers adequate to the administration of justice therein, is entitled to retain jurisdiction in the action first commenced.

The High Court of Admiralty of Ireland has co-ordinate jurisdiction with the Admiralty Division of the High Court of Justice.

On behalf of the owner of the *Harriett Williams* an affidavit was brought in, which alleged that the solicitor in Ireland for the owner of the *Catterina Chiazzare* had applied to the judge of the High Court of Admiralty of Ireland to dismiss the principal cause of damage commenced in that court against the *Catterina Chiazzare,* but that the application had been refused; that the officials in the registry of the High Court of Admiralty of Ireland had declined to file a declaration of the non-prosecution of the said principal cause, and the consent of the owner of the *Harriett Williams* to the dismissal of the bail given therein; that the owner of the

1876

THE CATTERINA CHIAZZARE.

Harriett Williams was desirous that the action commenced in the Admiralty Division of the High Court of Justice in England should be tried out; that all possible means had been taken on his part for abandoning and putting an end to the action commenced by him in the Irish Admiralty Court, and that he was still willing that the same should be dismissed, and would pay the defendant's costs incurred therein.

R. E. Webster, on behalf of the defendant under protest, moved in accordance with the notice of motion. [He referred to *The Lanarkshire* (1); *The Mali Ivo* (2); *Walsh* v. *Bishop of Lincoln.* (3)]

E. C. Clarkson, on behalf of the plaintiff, submitted that although the Court would stay proceedings in a case before it where it was proved that a plaintiff had elected to take proceedings in respect of the same cause of action in another Court of competent jurisdiction, the same consequences ought not to follow where the Court was asked to stay proceedings which the plaintiff had elected should be the only proceedings, and, so far as he had power to do so, had abandoned all proceedings elsewhere. [He also referred to *The Velocity* (4); *The Stork* (5); *The Orient.* (6)]

R. E. Webster, in reply.

Cur. adv. vult.

April 4. SIR ROBERT PHILLIMORE. In this case an action has been entered on behalf of the owner of a vessel called the *Harriett Williams.* The facts of the case necessary for the Court to state appear to be these:—The *Catterina Chiazzare* is an Italian barque, and the owner resides at Genoa. The owner of the brigantine *Harriett Williams* resides in the city of Cork in Ireland. On the 19th of December of last year the two vessels came into collision near Roches Point, close to the harbour of Cork, in Ireland, and the owner of the *Harriett Williams* instituted a suit in the High Court of Admiralty of Ireland against the *Catterina Chiazzare* in the sum of 900*l.*

A warrant under the seal of the Court of Admiralty of Ireland

(1) 2 Spinks, 189.
(2) Law Rep. 2 A. & E. 356.
(3) Law Rep. 4 A. & E. 242.
(4) Law Rep. 3 P. C. 44.
(5) Not reported.
(6) Law Rep. 3 P. C. 696.

was issued, and the *Catterina Chiazzare* was arrested at Cork. An appearance was duly entered for her; and on the 24th of December a bail bond was entered into on behalf of her owners; and on the 31st of December the vessel was released by the High Court of Admiralty of Ireland, and proceeded to her final port of discharge—Liverpool. A cross action had been entered on the 23rd of December in the High Court of Admiralty of Ireland on behalf of the *Catterina Chiazzare* against the *Harriett Williams* for the damages occasioned by the collision; and subsequently—some time, I think, in the month of February—the owner of the *Harriett Williams*, the plaintiff in the principal cause in the High Court of Admiralty of Ireland, gave notice to the owner of the *Catterina Chiazzare* that no further proceedings would be taken in this suit brought by them against the vessel, and that the plaintiff would be at the costs which at that time had been incurred. Previously to this notice having been given, the Court in Ireland had already stated that it was not competent to the owner of the *Harriett Williams* to abandon the action until he had first caused the *Catterina Chiazzare* to be released in an action he had commenced against her in this Court. Now the suit in this Court was instituted on the 26th of January, and on the 28th of February an appearance under protest was entered on behalf of the owner of the *Catterina Chiazzare*. Now, the objection on protest is to the effect that there is a lis alibi pendens between these two vessels in the High Court of Admiralty of Ireland, that an application having been made to the judge in the High Court of Ireland to dismiss the suit on behalf of the original suitor, the owner of the *Harriett Williams*, that Court refused to do so. Therefore the state of things is this, that there was a suit instituted in the High Court of Admiralty of Ireland by the same plaintiff who now institutes a suit in this Court, there being also a cross suit in Ireland; and the judge having refused to dismiss the plaintiff on his application from the suit, it is contended that it is competent to me to meet the matter by dismissing the proceedings instituted in this Court. I am of opinion that I ought not to allow this suit to be proceeded with at present.

I think that it has been clearly made out that there is a cause before the High Court of Admiralty of Ireland between the same

1876

THE CATTERINA CHIAZZARE.

parties for the same object, and arising out of the same cause of action as the action before me, and that no doubt, apart from technical considerations, it would be a most inconvenient course of proceeding to allow the same case to be heard at the same time in two different Courts. What I have to consider is, what other Courts have decided as to what constitutes a lis alibi pendens. On this point I may refer to my decision in another Court in *Walsh* v. *Bishop of Lincoln.* (1) I think that the plaintiff here has lost his way. I think that he should have applied to the High Court of Admiralty of Ireland to dismiss the suit as he did, and if that was refused, I think he ought to have appealed from that refusal. At all events, in the present state of things, I shall order the *Catterina Chiazzare* to be released, and the proceedings in this Court to be stayed. The question of costs will be reserved.

June 13. *E. C. Clarkson,* for the owner of the *Catterina Chiazzare,* moved the judge in Court to dismiss the action without any order as to costs.

R. E. Webster, for the owner of the *Harriett Williams.*

His Lordship ordered the action to be dismissed with costs.

Solicitors for plaintiff: *Pritchard & Sons.*

Solicitor for defendant, under protest: *Thomas Cooper.*

(1) Law Rep. 4 A. & E. 242.

[BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL* ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.]

1876
July 11.

THE OFFICE OF THE JUDGE PROMOTED BY DURST *v.* MASTERS.

Moveable Cross—Retable.

4CPD29
6PD170

A moveable wooden cross, without the sanction of a faculty or the concurrence of the appellant, the parishioners' churchwarden, but with the concurrence of the vicar's churchwarden, was by the vicar's authority placed on a retable or wooden ledge at the back of and immediately above the communion table in a parish church, with the intention that it should remain there permanently. Two days afterwards the cross was removed by the appellant, as churchwarden, without the authority of a faculty, from the retable, and taken by him out of the church, and retained by him. In a criminal suit promoted by the vicar in the Court of Arches against the appellant for having removed the same:—

Held, that the cross, in the position which it occupied while in the church, is forbidden by law: but as both parties were in the wrong in having acted without a faculty, the suit was dismissed without costs.

Liddell v. *Westerton* (Moore's Special Rep.); *Liddell* v. *Beal* (14 Moo. P. C. 1) explained and followed.

APPEAL by Saddleton Masters from an order of Sir R. Phillimore, as Dean of the Court of Arches (20th of October, 1875), passed on motion to oppose the admission of the responsive plea, and ordering the omission of certain articles contained therein.

The material portions of the pleadings are set forth in the report of the case in the court below. (1)

Fitzjames Stephen, Q.C., and Dr. *Tristram*, for the appellant. The question results very clearly from the judgment of the court below, whether this cross as described is legal or illegal; but the effect of the judgment would be that a new suit would have to be commenced in order to have this cross removed. On the authority of *Westerton* v. *Liddell* (2), and *Liddell* v. *Beal* (3), the illegality of the cross consists in its being placed in such a position relatively to the communion table that it can be taken as part of the ecclesiastical furniture of the table, and substantially forms one of its

* *Present*:—THE LORD CHANCELLOR (Lord Cairns), LORD HATHERLEY, LORD PENZANCE, SIR BARNES PEACOCK, and SIR MONTAGUE SMITH.

(1) Ante, p. 123. (2) Moore's Special Rep. 175.
(3) 14 Moo. P. C. 1, 9, 13.

1876

DURST v. MASTERS.

ornaments; and the illegality is still clearer by reason of its being moveable than if it were fixed.

[THE LORD CHANCELLOR. Their Lordships wish to hear from the respondent whether there is any substantial reason why the case should not be sent back to be heard on its merits.]

Dr. Stephens, Q.C., and *Phillimore*, for the respondent. This cross, having been put into the church by the incumbent, belonged to the parishioners, and no one has a right to interfere with it except the consistorial court. The law has been violated by the removal of this cross, and, pending this litigation, it is asked that it be restored.

[LORD HATHERLEY:—May an incumbent place anything he likes in a church without a faculty?]

Yes, subject to removal by order of a consistorial court; neither churchwarden nor any one else can take the law into his own hands.

Fitzjames Stephen, Q.C., was prepared to give the cross back to the clergyman, but not to its former position.

Their Lordships directed, on the consent of counsel, that the case should stand over, a special case to be drawn up by agreement of parties, the registrar to settle any disputed point which might arise.

The following special case was subsequently filed:—

Special case.

At the east end of the church there is a moveable communion table of wood. The table, though moveable, stands at the east end. At the back of the communion table there is a structure of wood called a retable, consisting of a ledge of wood, $11\frac{7}{8}$ths inches in width, and a front of wood $8\frac{1}{4}$ inches in height, coming down to within $\frac{5}{16}$ths of an inch from the top of the communion table as it stands. The two ends of the retable are co-terminous with the ends of the communion table as it stands, and come down below the top of the communion table in the form of brackets. There are two other similar brackets near the centre of the retable, also coming down below the level of the top of the communion table. The retable is fixed to the east wall of the church with nails.

The eastern side of the communion table as it stands is in close contact with the brackets of the retable.

On the retable and near its north and south ends stand two candlesticks.

On Thursday the 27th of May, 1875, after evening service, a moveable wooden cross, of 3 feet 3 inches in height, without the sanction of a faculty or the concurrence of the appellant, but with the concurrence of the vicar's churchwarden, was, by the vicar's authority, placed on the retable between the two candlesticks, with the intention that it should remain there permanently.

There are daily morning and evening services in the church, except that there is no morning service on Fridays. There are weekly celebrations of the Holy Communion.

The cross was, on Saturday the 29th of May, 1875, removed by the appellant as churchwarden, without the authority of a faculty, from the retable and taken by him out of the church, and is still in his custody. He is willing to give it to the vicar, but not to restore it to the place whence he took it.

The present question for the Court is whether the cross in its aforesaid position is not forbidden by law.

May 29. *Fitzjames Stephen, Q.C.*, and Dr. *Tristram*, for the appellant. According to *Westerton* v. *Liddell* (1) and *Liddell* v. *Beal* (2) a fixed cross as an architectural decoration is not illegal, unless it is fixed in the table or super-altare, in which case it is illegal. The character of the cross is described in various parts of the report of *Westerton* v. *Liddell* (see especially Moore's Special Rep. at pp. 151, 185), and is indistinguishable from this. In that case it was let into and fixed in the super-altare; in this case it was placed on the ledge of wood, with the intention that it should be permanently kept there. That is a mere attempt to evade the law. The monition in that case was, that the cross should be removed. Suppose it had been attempted to comply with such order by such a state of things as appears in this case, it would have been a colourable and fallacious compliance with the order. Assuming that there is a distinction between moveable and fixed crosses, still this cross was an illegal ornament within the ornament rubric, as construed in several cases, especially *Martin* v. *Mackonochie.* (3)

(1) Moore's Special Rep. (2) 14 Moo. P. C. 1.
(3) Law Rep. 2 P. C. 390.

1876

DURST v. MASTERS.

It was considered in *Westerton* v. *Liddell* (1) more objectionable than a fixed cross. (2) The judgment delivered by Dr. Lushington turned entirely on the theory that the cross was an ornament. The Privy Council held that it was not an ornament, and pronounced that it was illegal, even if it were an ornament or architectural decoration. For definition of an ornament, see p. 156 of Moore's Special Rep.; the ornament rubric and construction put thereon in *Westerton* v. *Liddell* (3); *Hebbert* v. *Purchas* (4); *Martin* v. *Mackonochie.* (5) The word "ornaments" is confined to those articles the use of which in the services and ministrations of the Church is prescribed by the Prayer Book of Edward VI.

The case of Smith before the Bishop of Exeter, in 1847, was mentioned, referred to by Dr. Lushington in the consistory court. The Bishop of London refused to consecrate a church with a moveable cross in it, and suggested that it should be fixed: see judgment of Sir John Dodson. (1) The cross on the screen of St. Barnabas and on the table even held to be illegal (6): for distinction between architectural, and altar, and other crosses, see Moore's Special Rep. at p. 175. If this case is not governed by *Liddell* v. *Beal* (7) it is submitted that this cross is an ornament not prescribed by the rubric in Edward VI.'s Prayer Book: see Bingham's Works, vol. iii., p. 102, book viii., c. 6, s. 19; *Elphinstone* v. *Purchas.* (8) The appellant has no objection to the cross being placed in some other part of the church.

Dr. Stephens, Q.C., and *Phillimore,* for the respondent. The distinction is between instrumental ornaments and decorative ornaments, which, like the cross in this case, are inert and unused. For definition of these latter, see *Martin* v. *Mackonochie* (9); *Westerton* v. *Liddell* (10); *Liddell* v. *Beal.* (11) It is admitted on behalf of the respondent that if this cross had been fixed to the table it would have been illegal. Smith, in the case alluded to on the other side, laid certain ornaments on the table, and the Bishop of Exeter held that they were illegal during Holy Communion,

(1) Moore's Special Rep. 107, 108.
(2) Moore's Special Rep. at p. 161.
(3) Moore's Special Rep.
(4) Law Rep. 3 P. C. 605.
(5) Law Rep. 2 P. C. 390.
(6) Moore's Special Rep. 155.
(7) 14 Moo. P. C. 1.
(8) Law Rep. 3 A. & E. 106, 107.
(9) Law Rep. 2 P. C. 387.
(10) Moore's Special Rep. 156, 175.
(11) Moo. P. C. 7, 9, 12, 14.

because they were not included in the rubric of Edward VI. But the ornaments rubric applies to the conduct of the services of the church; it has nothing to do with the fabric, or the furniture, or the fittings; and this cross is a mere piece of decorative furniture: see *Phillpotts* v. *Boyd.* (1) The reredos, moreover, in that case had a cross upon it. (2) There is no essential distinction between the cross on the rood-screen in *St. Barnabas's Case*, the cross in *Phillpotts* v. *Boyd* (1), and the cross in this case; in all three cases it is merely decorative. Moveability is not a criterion of the legality of a cross; if a fixed cross is lawful, still more so is a moveable cross. This cross is on a separate structure, only by juxtaposition connected with the table; it is not fixed to a ledge standing on the table, or to the table itself, and is therefore distinguishable from the cross in St. Paul's Church. The appellant has offered to send it back to any other part of the church; why not allow it on the ledge?

Fitzjames Stephen, Q.C., replied.

Cur. adv. vult.

July 11. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is a criminal suit promoted in the Court of Arches against the appellant, who is one of the churchwardens of the parish of St. Margaret, in the borough of King's Lynn, for having removed from the church, without a faculty, a certain moveable cross of wood which had been placed on a ledge called a "retable," on the back of and above the communion table.

The respondent is the vicar of the parish, and the cross was placed there by his authority, but without the sanction of a faculty.

In the Court below exception was taken to certain passages in the responsive allegation filed by the appellant, and they were ordered to be struck out.

The present appeal is in form an appeal from that order, but on the case being opened it appeared to the parties that, as the facts were not really in dispute, it would save both expense and

(1) Law Rep. 6 P. C. 466. (2) Law Rep. 4 A. & E. 313.

1876

DURST v. MASTERS.

delay if they agreed to a statement of fact in the form of a special case, and took the decision of the Court of Appeal upon the merits of the case.

Their Lordships consented to that course being pursued, and the case has been fully argued upon the special case so stated.

The question which their Lordships are thus called upon to decide is the single one of the legality of a cross of this description in the place which it occupied when the appellant removed it from the church.

The special case states that the cross is above three feet in height; that it is a moveable one; that it was placed by the respondent's orders on a structure of wood called a "retable," consisting of a wooden ledge at the back of the communion table, having a front of wood about eight inches deep, coming down to within five-sixteenths of an inch of the surface of the communion table, and that this structure is fixed to the wall by nails.

A photograph is appended to the special case, from which, and the statements in this case, it is plain that the communion table and the "retable" would at a very short distance bear the appearance of one entire table or structure.

It is further stated that the cross was placed on this ledge with "the intention that it should remain there permanently."

On the part of the respondent it was contended that the cross was a moveable one, and constituted part of the church furniture; that it was not one of the "ornamental instruments" used in the church services; and that it fell within the category of things "inert," which were mere architectural decorations.

On the part of the appellant it was contended, amongst other things, that the case fell within the principle of the well-known decision in the cases of *Liddell* v. *Westerton* (1), and *Liddell* v. *Beal* (2); and as their Lordships are of that opinion, it will not be necessary to go again into the subject at large, or do more on the present occasion than point out what it was that those cases really decided, and give reasons for the conclusion that the present case cannot in principle be distinguished from them.

The two cases in question concerned the church of St. Paul and the chapel of St. Barnabas. In both instances there had been

(1) Moore's Special Rep. (2) 14 Moo. P. C. 1.

placed on the communion table a cross, and in both instances these crosses were held to be illegal. It is important, therefore, to consider what the character of these crosses was, and on what grounds they were ordered to be removed. In the chapel-of-ease of St. Barnabas the things complained of were, first, a rood-screen and a cross thereon, which cross was held to be lawful; and, secondly, "a stone table or altar with a metal cross attached thereto," and this cross was held to be unlawful.

The cross complained of in the church of St. Paul was attached to the communion table, and is thus described in the judgment at page 2:—

"Their Lordships understand that this table, described as an altar or communion table, is made of wood, and is not attached to the platform, but merely stands upon it; that it is placed at the east end of the church or the chancel, according to the ordinary usage as to communion tables; that at the end nearest the wall there is a narrow ledge raised above the rest of the table; that upon this ledge, which is termed 'super-altare,' stand the two gilded candlesticks, which are moveable, and between them the wooden cross, which is let into and fixed in the super-altare, so as to form part of what is thus described as the altar or communion table."

It will be observed that this description closely tallies with the description as given in the special case of the communion table in the present case. There is here, as there, a moveable table, and a ledge of wood raised above the table at the back of it, and on this ledge two candlesticks, and a cross between them. The differences are, that in St. Paul's Church the ledge of wood was called a "super-altare," while in this case it is called a "retable;" in St. Paul's Church the ledge stood upon the table, while in this case it is fixed to the wall and does not quite touch the table, being separated by about a quarter of an inch from it; and finally, that in St. Paul's Church the cross was "let into and fixed" in the ledge, while in the present case it was not fixed, but placed on the ledge "with the intention that it should remain there permanently."

It is upon these differences of structure that the respondent relies, and he points particular attention to a passage in the

1876

DURST
v.
MASTERS.

judgment relating to the cross in St. Paul's Church, which is as follows:—

"Next with respect to the wooden cross attached to the communion table at St. Paul's. Their Lordships have already declared their opinion that the communion table intended by the Canon was a table in the ordinary sense of the word, flat and moveable, capable of being covered with a cloth, at which or around which the communicants might be placed in order to partake of the Lord's Supper; and the question is, whether the existence of a cross attached to the table is consistent either with the spirit or with the letter of those regulations. Their Lordships are clearly of opinion that it is not; and they must recommend that upon this point also the decree complained of should be affirmed."

It is argued by the respondent that their Lordships must have intended to have condemned only crosses which were "fixed" to a ledge standing on the communion table or to the communion table itself, and that the two circumstances in the present case, of the ledge being a quarter of an inch above the table, and the cross not fixed in the ledge but moveable, are sufficient to take it out of the principle of that judgment.

Their Lordships are unable to accept or approve so narrow and limited a view of the conclusion arrived at in those important cases.

It is hardly to be conceived that a distinction should have been intended to be drawn between a cross "attached" to the table (or the ledge above the table) and a cross occupying a "permanent" position upon it; and still less that the lawfulness or unlawfulness of the cross should be declared to reside in such a distinction.

Upon such a view of the law, further refinements would be inevitable; for, on the one hand, a cross might be "let into and fixed" in the "retable" in such a manner as to be easily removed if and when desired, and therefore practically moveable; and, on the other hand, it might be ponderous, not easily moved, and intended to remain permanently in its place, and yet not actually "fixed" in the sense of being fastened to the ledge or table on which it stands.

To hold that such refined differences as these constitute the distinction between what is lawful and what forbidden by the law

would be to give every importance to matters which are trivial and incidental, to the exclusion of those which are substantial and of serious import.

To any stranger entering the church, the present structure is not perceptibly different from that which was presented to the eye in the church of St. Paul. The flat table, the narrow ledge rising above it, the candlestick at either end of this ledge, and the cross in the middle, constitute the apparent structure in both cases. It would be only by a minute inspection, instituted close at hand, that any difference would be revealed between them. For those who attend the services in this church, therefore, these differences do not practically exist, and whatever objection attended the communion table with its cross in the case of St. Paul's church is equally present here.

When the judgment in the above cases is carefully considered, it is very apparent what that objection was; and why the crosses on the altar or the communion table in both cases were declared unlawful.

Speaking of the altar in St. Barnabas, their Lordships said, "The question was, whether the structure was a communion table within the meaning of the law," and with respect to St. Paul's, "whether the existence of a cross attached to the table is consistent either with the letter or the spirit" of the regulations made by law.

To answer these questions their Lordships inquired at length into the character and appearance of the Roman Catholic altar as it existed before the Reformation—the doctrines respecting the Holy Communion which that altar was designed to subserve, and to which it was intended to conform—the change in these doctrines which was effected by the Reformation, and the consequent substitution of the plain flat moveable table of wood for the fixed altar with its super-altare, its crucifix, and candlesticks at either end.

It was upon a careful review of these facts and considerations, and not upon any refined distinction as to the mode in which the cross was connected with the table, that their Lordships, construing the legal regulations bearing on the subject, came to the conclusion that a communion table such as that in the church of

1876

DURST v. MASTERS.

St. Paul was not warranted by those regulations; and their decision, therefore, applies to and governs the present case, in which the structure complained of is, their Lordships think, in no substantial or essential feature distinguishable from it.

Some additional light is thrown on the meaning and intention of the judgment above discussed by the subsequent proceedings in one of the cases (*Liddell* v. *Beal* (1)) to which that judgment gave rise.

It was thought by Mr. Beal that the monition of the Court, for the removal of the cross in the chapel of St. Barnabas, had not been complied with by removing the cross from the altar and placing it on the sill of the great eastern window of the church, immediately above the communion table, though at a distance of five feet from it, and he instituted proceedings complaining of this as an evasion.

Their Lordships thought differently, and expressed themselves as follows:—

"Now there was formerly a cross which stood upon the stone table, and was in a sense at least affixed to it, which was objected to, and, as it appears, properly objected to. The stone table has been altogether removed, and with it the cross, but the cross has been placed in another part of the church, not in any sense upon the table which has been substituted for the stone table, nor in any sense in communication, or contact, or connection with it. It remains in the church as an ornament of the church . . . . and does not conflict with the order contained in this monition."

It will here be observed that no stress is laid on the fact that the cross was no longer alleged to be "fixed," which, if the respondent's view of the principal decision were correct, would at once have determined the question; but the retention of the cross in its new position is justified upon the ground that it was not "in any sense upon the table, nor in any sense in communication, or contact, or connection with it."

It is plain, therefore, that, in the decision of the principal case, it was not to the cross itself that any objection was made, nor to the particular means or fastenings by which it was retained in its place, but to its connection with the communion table; and if,

(1) 14 Moo. P. C. 1.

instead of removing the cross to a place several feet above the table, and quite unconnected with it, Mr. Liddell had simply made the cross a moveable one, and fixed a retable to the wall (such as in the present case) for it to stand upon, it is inconsistent with the language just quoted to suppose that their Lordships would have held the monition to have been complied with.

Their Lordships are therefore of opinion that the cross in the position which it occupied while in the church is forbidden by law; and they will advise Her Majesty that the present suit should be dismissed; but, as both parties have been in the wrong in acting without a faculty, without costs.

Proctor for appellant: *W. G. Jennings.*
Proctor for respondent: *G. H. Brooks.*

[BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL* ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.]

March 14.

RIDSDALE, APPELLANT; CLIFTON AND OTHERS, RESPONDENTS.

Stay of Execution on Motion pending Appeal—Inhibition—Public Worship Regulation Act, 1874, *s.* 9—*Motion.*

4 PD 70
1 PD 170
7 App Cas 242.

Although in every appeal in ecclesiastical cases it has been very much a matter of course and a ministerial act of the officer of the Court to issue an inhibition, yet a discretion rests with the appellate tribunal to issue it or not.

Under the Public Worship Regulation Act, 1874, s. 9, the ecclesiastical judge has power to restrain proceedings under the decree during the whole of the appeal.

In an appeal pending against a decree of the judge of the Arches Court pronouncing unlawful (1) the wearing of certain vestments; (2) the use in the Holy Communion of wafer bread or wafers; (3) the minister standing in a particular position; (4) the setting up and placing on the top of the screen separating the chancel of the church from the body of the church, and still retaining thereon, a crucifix, the judge refused to suspend the execution of any part of the decree. The Judicial Committee of the Privy Council, although no appeal was given from such order by the Act, nevertheless, on motion made, in the exercise of their discretion, directed that by the inhibition the execution of that portion of the decree which related to the crucifix should be suspended pending the appeal.

THIS was a motion on behalf of the appellant that the Judicial

* *Present:*—The LORD CHANCELLOR (Lord Cairns), LORD HATHERLEY, SIR ROBERT J. PHILLIMORE, SIR BARNES PEACOCK, and SIR MONTAGUE E. SMITH.

1876

RIDSDALE v. CLIFTON.

Committee would direct the usual inhibition and citation and monition for process to issue. By the part of the decree appealed from (1), which was made on the 3rd of February, 1876, the appellant was admonished to abstain from certain practices, acts, matters, and things therein set forth, namely, from wearing certain unlawful ecclesiastical vestments when officiating in the Communion Service; from administering wafer bread in the Communion; from standing while saying the Prayer of Consecration in the Communion Service at the middle of the west side of the communion table, between the people and the communion table, with his back to the people; and from retaining a crucifix set up without lawful authority on the screen separating the chancel of his church from the nave thereof. As regards the last matter, it was stated in the judgment that "a removal of the figure, leaving the cross standing, will be a compliance with this order." (2) On the same day that the decree was pronounced the respondents filed a caveat in the registry of Her Majesty's Court of Appeal, in the following words:—

"In the matter of *Clifton and Others* v. *Ridsdale*, and of any appeal to Her Majesty in Council from the judgment of the judge of the Provincial Court of Canterbury therein, under the provisions of the Public Worship Regulation Act, 1874. Let no inhibition be granted to affect the execution and enforcement of such judgment pending such appeal unknown to us, the undersigned proctors for the said Clifton and Others,

"Moore and Currey."

On the 7th of February, 1876, the respondents applied for a monition in accordance with the decree, and then delivered into the registry of the Arches Court a præcipe for the same; such monition was sealed and issued on the 19th of February, and served on the appellant on the 24th of the same month.

Notice of appeal was lodged in the registry of the Arches Court on the 19th of February, subsequently to the issue of the monition.

On the 26th of February the proctor for the appellant applied in the appeals registry for the usual inhibition and citation and

(1) Ante, p. 363. (2) Ante, p. 359.

monition for process, and ascertained that the above caveat had been entered by the proctors for the respondents. The registrar declined to issue the inhibition and citation.

On the same day the appellant moved the judge, in the Court of Arches, to suspend the execution of the monition, in respect of the four points appealed, pending the appeal. The monition was refused with costs by Lord Penzance. (1)

Phillimore, for the appellant, in support of the motion, stated that the appeal was from the order of the registrar to the discretion of their Lordships, and not from the order of Lord Penzance. The issuing of an inhibition was a matter of course, as an essential part of the triplicate process of inhibition, citation, and monition for process which was necessary to the prosecution of an appeal, and had the effect of restraining the execution of the decree. The two distinct steps on the part of the appellant were, first, the inhibition and citation, and second, the monition for process. The appellant could only obtain his citation by obtaining the inhibition; for they were granted at one and the same time, and they were both included in the same common form of application and order. In *Poole* v. *Bishop of London* (2) it was doubted whether any appeal lay, and therefore the inhibition was refused; and in *Herbert* v. *Herbert* (3) the inhibition was reluctantly refused under the special circumstances of the case. But there was no other instance of refusal, and the issue of the inhibition was always regarded as a matter of course, and left as a ministerial act to the officer of the Court. [He referred to the 97th Canon.] The effect of the rules issued by this board, dated the 11th of December, 1865, in pursuance of 6 & 7 Vict. c. 38, was to make the issuing of an inhibition absolutely necessary. [He referred to rules 3, 4, 5, 6, and 7, and also to the Public Worship Regulation Act (37 & 38 Vict. c. 85), ss. 7 and 9, and to No. 24 of the rules issued thereunder.]

[THE LORD CHANCELLOR referred to the 20th rule of the 11th of December, 1865.]

Shaw, for the respondents, contended that, having regard to the

(1) Ante, p. 364. (2) 14 Moo. P. C. 262.
(3) 2 Phillim. Eccl. 430.

1876

RIDSDALE v. CLIFTON.

Public Worship Regulation Act, 1874, no inhibition ought to be granted, but a citation and monition for process only; no caveat had been filed against the latter if unaccompanied by an inhibition. The intention of the Act (see s. 9) was to create a new practice; and give to the judge himself the power of deciding whether an inhibition should be granted. The Church Discipline Act, s. 13, was construed in a similar way: see *Sheppard* v. *Bennett* (1), where letters of request having been refused by the Dean of Arches, the Privy Council held that it had no discretion. If this Court has a discretion, it will pause before overruling the discretion of the Court below, unless it is clearly wrong. No special circumstances have been shewn why the inhibition should be issued.

Phillimore, in reply.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. In the case in which their Lordships have now to express their opinion an appeal has been instituted against the decision of Lord Penzance, as judge of the Arches Court, dated the 3rd of February, 1876; and the matters complained of, with regard to that decision, are these: first, that it pronounces unlawful the wearing of certain vestments; secondly, that it pronounces as unlawful the use in the Holy Communion of wafer bread or wafers; thirdly, that it pronounces unlawful the standing by the minister, while saying the Prayer of Consecration in the Communion Service, at the middle of the west side of the communion table, in such wise that during the whole time of the saying of the prayer he was between the people and the communion table, with his back to the people, so that people could not see him break the bread or take the cup into his hand; and, fourthly, that it pronounces as unlawful the setting up and placing on the top of the screen separating the chancel of the church from the body of the church, and still retaining thereon, a crucifix. The decree which is thus complained of and appealed against in its form admonishes the present appellant, the Reverend Charles Joseph Ridsdale, to abstain for the future from the practices and acts set forth in the decree, and from sanctioning and permitting the same; and it also

(1) Law Rep. 2 P. C. 450.

further goes on to direct, affirmatively, the Reverend Charles Joseph Ridsdale to remove, or cause to be removed, from the top of the screen the figure on the cross fixed thereon.

Now that decree having been made, and notice of appeal having been given, an application was made, as is usual in such cases, for the process which is called inhibition, and citation and monition for process—monition for documents; and against the issuing of that process a caveat has been lodged, which has made it necessary for the Rev. Mr. Ridsdale, the appellant, to come before their Lordships, and to ask that the process which he seeks should issue. If the process issues in the triplicate form to which I have referred, of inhibition, citation, and monition, the inhibition will restrain the execution of the decree to which I have referred, pending the appeal; and therefore, in substance, the motion now before their Lordships raises the question whether proceedings in this case under the decree should or should not be stayed pending the appeal.

Now, it has been contended, on behalf of Mr. Ridsdale, here, in the very able argument which we have heard, that the issuing of an inhibition, in cases like the present, has always been a matter of course, and is still a matter of course, notwithstanding the provisions of the Public Worship Regulation Act of 1874, and that therefore the caveat against the issuing of the inhibition ought to be removed, and the inhibition ought to issue as a matter of course, as part of the process. That makes it necessary for their Lordships to consider what the nature and character of the part of the process termed the inhibition, upon the occasion of an appeal, was before the passing of the Act of Parliament to which I have referred. There is no doubt that in every appeal in ecclesiastical cases it was very much a matter of course to issue an inhibition. It was in fact so much a matter of course that it was permitted to the officer of the court to issue the inhibition as part of the process whenever it was applied for. But their Lordships cannot arrive at the conclusion that because in every case where there was, or appeared to be, a probable cause for litigation, evidenced by the appeal being brought, the issue of this process was so common as to be left as a ministerial act to the officer of the court; they cannot from this arrive at the conclusion

1876

RIDSDALE v. CLIFTON.

that the discretion of the Court as to issuing an inhibition was taken away, or that this tribunal or the supreme tribunal for the time being in ecclesiastical cases, where a case was brought pointedly before its notice, would not have it in its power to exercise its discretion as to whether an inhibition staying proceedings should or should not issue. If their Lordships look to authority upon the subject they cannot but think that the expressions of Sir John Nichols, in the case of *Herbert* v. *Herbert* (1), shew very clearly that in his opinion in a proper case the discretion rested with the tribunal to issue, or not to issue, an inhibition; and the authorities which are referred to in the argument, in that case of *Herbert* v. *Herbert* (1), go very strongly to the same point, especially the passage cited from Ayliffe's Parergon, which is printed at length in a note to the case of *Herbert* v. *Herbert.* (1)

Moreover, upon the reason of the thing, their Lordships also are of opinion that a Court which has the right to entertain an appeal must of necessity have this discretion with regard to the issuing of a process, such as inhibition. The inhibition is only a collateral and incidental part of the process. The main process is that of citation, calling upon the party in possession of the decree to appear before this tribunal, and to defend the decree which he has obtained. It would be a strange thing indeed if that which is ancillary and incidental to the main jurisdiction of the appellate tribunal could not be moulded, issued, or refused to be issued, as the tribunal should think best under the circumstances of the particular case. I have only to add to this, with regard to the position of matters before the passing of the Public Worship Regulation Act, the circumstance that certain rules were issued by this board in pursuance of the statute 6th and 7th of the Queen, chap. 38, and that it is necessary to refer to an argument which has been urged with regard to these rules, that they in some way have made the issuing of an inhibition in this case absolutely necessary. Now the rules which are material upon this point are the 4th and 5th. The 4th is in this form: "When the registrar has ascertained that the petition of appeal has been referred to the Judicial Committee, he may, on the application of the solicitor, issue the usual inhibition and citation and monition for process." He may do this, on

(1) 2 Phillim. Eccl. 430.

the application of the solicitor, issue the triplicate form of process, inhibition, and citation, and monition for process; but if their Lordships are right in considering, as they do consider, that the issue or non-issue of the inhibition was a matter of discretion, of course this reference in the rules to the usual inhibition, citation, and monition for process must mean triplicate process when it was to be in triplicate; and where, if ever, the Court should hold that the inhibition should not issue, then the process was confined and limited to the citation and monition for process. This 5th rule is to this effect: "If within one month from the date of the petition of appeal being referred to the Judicial Committee the solicitor for an appellant shall not take out the inhibition and citation and monition for process, the appeal shall stand dismissed." Upon that it was argued, that, unless the threefold process were to issue, Mr. Ridsdale would be deprived of his appeal, and it would be absolutely dismissed in consequence of this order. Their Lordships cannot adopt that construction of the rule. In their opinion, if it is in their discretion, as they think it is, to say, on a proper case being presented to them, whether the inhibition shall or shall not issue, the order that it shall not issue will render the taking out the other two parts of the process, the citation and monition for process, sufficient to save the appeal under this order. In point of fact, the description of the triplicate process is description only, and does not raise the necessity, as an absolute necessity, that the process should be in that triplicate form.

Now, that being the state of the law, as their Lordships understand it, before the Act for the Regulation of Public Worship passed, their Lordships have to consider the effect of that statute. Their Lordships approach the consideration of the statute, bearing in mind, therefore, that, before it passed, the issue of an inhibition, although so common as to be almost matter of course, was still matter of discretion, if the discretion of this board were called upon to be exercised upon it. The statute of 1874 provides, by the 9th section, what shall be the form of proceedings before the judge under the Act, or the judge of the Court of Arches, as the case may be, and it provides that the judge shall pronounce judgment on the matter of the representation, and shall deliver to the parties on application, and to the bishop, a copy of the special case, if

1876

RIDSDALE v. CLIFTON.

any, and judgment. It provides further that the judge shall issue such monition, if any, and make such order as to costs as the judgment shall require. It provides then, further, that upon any judgment of the judge, or monition issued in accordance therewith, an appeal shall lie in the form prescribed by rules and orders to Her Majesty in Council; and then comes this final sentence in the clause: "The judge may, on application, in any case suspend the execution of such monition, pending an appeal, if he shall think fit." We find, therefore, in this Act of Parliament, that which certainly did not exist as a power in the ecclesiastical judge before the Act passed. Before this Act passed there was no power whatever in the ecclesiastical judge to suspend proceedings under his decree pending an appeal. There was, as has been pointed out at the bar, a power somewhat, perhaps, arbitrary in the judge to keep possession of his decree in the office of the court until an opportunity were given for the dissatisfied party to present a petition of appeal to Her Majesty in Council, and to obtain an inhibition, which, if obtained, would prevent the execution of the decree. But power in the judge himself to restrain proceedings under the decree during the whole of the appeal did not exist. That was given for the first time by this statute.

Now their Lordships cannot look at this provision in the statute as other than an indication that in the opinion of the legislature it ought to be considered in each particular case whether the decree made in that case should be executed pending an appeal, or should be stayed pending an appeal. The intimation of the legislature is distinct, that that is a matter which ought to be entertained as a question of discretion, and brought, at all events in the first instance, for the decision of the judge himself who has made the decree. That has been done in the present case, and the decision of the judge in the present case is, for reasons which he has stated, that the execution of no part of his decree should be suspended pending the appeal. Their Lordships are not sitting upon appeal from that order of the learned judge, because no appeal from that order appears to be given by the Act of Parliament; but they are sitting here considering the application which is now made to them, that in their discretion the inhibition in the present case should not issue restraining the execution of this

decree, either in whole or in part, and they are unable to treat the Act of Parliament as doing otherwise than introducing a new element for them to consider in exercising their discretion as to whether the inhibition ought to issue.

Now, therefore, applying those principles to the case which their Lordships have to decide, in their opinion, the mode in which they have to look at a case like the present is this: to consider the balance of convenience or inconvenience with regard to the execution of the decree; that is to say, looking at the facts of the particular case, looking at what is ordered by the Court to be done, whether upon the whole it would be better that the decree of the judge should be allowed to take its course, or whether the things which it orders to be done are in their nature such as that the doing of them would produce so much injury that it would be more desirable that the decree should be stayed until the decision of the final tribunal is known. That is a practice which is well known in other Courts. It is well known, for example, in the Court of Chancery, where, upon an application to stay the execution of a decree, it has always been considered to be the question for the Court whether the balance of convenience was more in favour of restraining the execution of the decree in the particular case, or more in favour of letting the decree take its course.

Now in the present case, their Lordships do not desire to express, and it would not be proper for them to express, any opinion whatever as to the merits of the appeal, which ultimately will have to be heard from this decree. They give credit for the present purpose to the decree as the decree of the learned judge by whom it has been made. On the other hand, they give credit to the sincerity of those who have considered that there is ground for impeaching that decree, and who wish to have their case against the decree heard at the proper time. But, on the other hand, treating the decree as at present, until reversed, the order of the Court, and on the other hand treating the appeal as evidence that in the opinion, at all events, of the appellant there is probabilis causa litigandi, they have to look at what are the things which the decree orders to be done or to be left undone. Now in that respect they find a very marked difference between different parts of the decree. With regard to the vestments pronounced unlawful,

1876

RIDSDALE v. CLIFTON.

and which therefore are directed not to be worn; with regard to the use of the wafer bread, which is also pronounced to be unlawful, and which is therefore directed not to be used; with regard to the posture of standing during the Prayer of Consecration at the west side of the communion table, which is also pronounced unlawful, and where therefore the minister is directed not to stand at that time; with regard to all these things, their Lordships consider that no inconvenience and no injury which would be irremediable will arise from the decree being obeyed in those matters pending the appeal.

The other point is different. I refer to the part of the decree which pronounces unlawful the setting up and placing on the top of the screen separating the chancel of the church and retaining there a crucifix; and as to this the decree directs the Rev. Charles Joseph Ridsdale to remove or cause to be removed this crucifix from the screen. Their Lordships do not desire to make any difference between this and the other parts of the decree as to what may be termed the merits; that is to say, they do not, by what they are going to order, wish to place that part of the decree in any different position from the other parts of the decree as regards the correctness of the decree itself. They give credit on that part of the decree as they do to the other parts of the decree, to that which is for the present the decision of the Court below, but they see that different consequences may arise, as to this part of the decree, from executing it pending the decree. It is unnecessary to go into what those consequences are, beyond saying that it is, obviously from the nature of the case, at least possible that a subject which ought to be treated with the greatest reverence might be accompanied with feelings of a different kind if the decree were in this respect in the first instance to be executed, and afterwards upon a reversal of that decree the process had to be repeated of making another change.

For those reasons, and for those only, their Lordships desire to make a difference between this last part of the decree and the parts which precede it. And as to this latter part of the decree, they desire that by the inhibition the execution of that part of the decree should be suspended pending the appeal. The inhibition therefore will go limited in the manner which has been indicated

to the last part of the decree, but not so as to restrain the execution of any of the other parts of the decree. With regard to costs, their Lordships do not think fit to give any costs of this appeal to either side.

Proctor for appellant: *G. H. Brooks.*
Proctors for respondents: *Moore & Currey.*

THE DELTA. (5885.)
THE ERMINIA FOSCOLO. (5971.)

July 25.

Damage—Lis alibi pendens—Foreign Judgments by Default—Default for Want of Appearance—Default in Pleading.

The owners of the ship *D.* instituted proceedings in a foreign Court against the owner of the ship *E.* in respect of a collision between the two ships. The owner of the *E.* instituted a cause of damage in this country in respect of the same collision against the ship *D.* The owner of the *E.* neglected to enter an appearance in the foreign Court, but instituted a cross cause in the foreign Court against the owners of the *D.* In both suits in the foreign Court the owners of the *D.* obtained judgment by reason of the defaults of the owner of the *E.* The owners of the *D.*, having appeared in the cause instituted in this country, pleaded the foreign judgments in bar. The Court in this country, having decided on the merits in favour of the owner of the *E.*, refused to give effect to the defence of res judicata.

THESE were causes of damage. The principal cause, No. 5885, was instituted on behalf of the owners of the Italian barque *Erminia Foscolo* and the owners of her cargo against the French steamship *Delta*, the other, a cross cause, No. 5971, was instituted on behalf of the owners of the *Delta* against the owner of the *Erminia Foscolo.*

The petition in the principal cause alleged in substance that on the 11th of August, 1871, the *Erminia Foscolo* was proceeding through the Straits of Gibraltar when the *Delta* approached and came into collision with her, doing her considerable damage, so that the *Erminia Foscolo* was in consequence afterwards compelled to take the assistance of the *Delta*, and to be towed by her to Gibraltar. That the collision had been occasioned by the negligent and improper navigation of the *Delta.*

The answer in the principal suit as amended at the hearing on

1876

THE DELTA. THE ERMINIA FOSCOLO.

the 30th of July, 1874, commenced with stating the circumstances in which, according to the case set up on behalf of the *Delta*, the collision had occurred, and after attributing blame to the *Delta* for improperly deviating from her course before the collision, and denying the truth of all averments in the petition inconsistent with the circumstances stated in the answer alleged in substance as follows:—

6. The said collision, and the damages and losses consequent thereupon, were caused by the negligent navigation of the *Erminia Foscolo* and those on board her. No blame is attributable to the *Delta* or those on board her in respect of the said collision.

7. The *Erminia Foscolo*, at the time of the said collision, was an Italian ship, and her owner was then, and always since has been, and now is, resident in Italy and an Italian subject.

8. In or about the month of September, 1871, the owner and master of the *Erminia Foscolo* commenced a suit against the company of the Messageries Maritimes, the owners of the said steamship *Delta*, and against the said steamship, in the Court of the Tribunal of Commerce at Marseilles, in the Republic of France, and prayed the said tribunal to declare the said owners of the *Delta* responsible for the consequences of the collision between the *Erminia Foscolo* and the *Delta* on the night of the 11th of August, as hereinbefore mentioned, and to condemn the said defendants, the owners of the *Delta*, to pay to the said plaintiffs in the said suit the amount of their damages and costs.

9. In or about the said month of September, 1871, the master of the *Delta* and the said company, the owners of the said steamship, instituted proceedings against the master and owner of the *Erminia Foscolo* and the said barque in the said Tribunal of Commerce at Marseilles, and prayed the said tribunal to condemn the defendants in the said suit jointly and severally, the one as master and the other as owner of the *Erminia Foscolo*, to be civilly liable to pay to the said company the amount of the damage and losses occasioned to the *Delta* in the said collision between the *Delta* and the *Erminia Foscolo*, which had taken place in the Strait of Gibraltar, as hereinbefore mentioned, by the improper navigation of the captain of the *Erminia Foscolo*, together with costs.

10. At the time of the institution of the said respective suits and proceedings, and until and at the time of the judgments given in the same as hereinafter mentioned, the said Tribunal of Commerce was a Court of competent jurisdiction to entertain the said suits and proceedings, and to adjudicate thereupon, and had jurisdiction over the said parties to the said suits and proceedings in and about the premises.

11. The master and owners of the *Delta* duly appeared as defendants in the suit brought against them by the said master and owner of the *Erminia Foscolo* in the said Tribunal of Commerce as aforesaid, and the said master and owner of the *Erminia Foscolo* appeared and defended the suit brought by the said master and owners of the *Delta*. Subsequently to such appearances proceedings were duly had and taken in the said suits before the said tribunal in accordance with the laws of France.

12. After several adjournments, granted at the request of the master and owner of the *Erminia Foscolo*, the cause which they had brought against the said company of the Messageries Maritimes, the owners of the *Delta*, was definitely fixed for hearing by the said tribunal upon the 22nd day of December, 1871. Upon the said 22nd day of December, the said Tribunal of Commerce delivered judgment by default against the plaintiffs in the said suit, and rejected their claim against the said company, and dismissed the said company from the suit brought against them as aforesaid.

13. The cause brought by the owners of the *Delta* against the master and owner of the *Erminia Foscolo* was also appointed by the said Tribunal of Commerce to be heard upon the said 22nd day of December; and upon the said day the plaintiffs in the said cause having proved their case to the satisfaction of the Court, and the defendants in the said cause not appearing to contradict their evidence, the said Tribunal of Commerce delivered its judgment in the said cause, and condemned the master and owner of the *Erminia Foscolo* to pay to the said company the amount of the loss and damage sustained by the *Delta* by reason of the said collision, which was by the said judgment determined to have been occasioned by the improper navigation of the master of the *Erminia Foscolo*.

14. Notice of the said decrees of the said tribunal was duly given to the said owner and master of the said *Erminia Foscolo* in accordance with the requirements and provisions of the law of France, and all things on the plaintiffs' part have been done to make, and the said judgments have now by the law of France become and are valid, and conclusive, and final judgments, and binding upon the plaintiffs, and are still in full force and effect.

15. The defendants submit to this honourable Court that by reason of the aforesaid judgments the plaintiffs ought not to be allowed to further prosecute this suit against the *Delta*.

The prayer of the answer was that the judge would pronounce against the damage proceeded for, and dismiss the defendants and their bail from the suit with costs.

On behalf of the plaintiffs a reply was filed; such reply denied the truth of the several allegations contained in the 6th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th articles of the answer, and those averments in the 1st, 2nd, 3rd, and 4th articles of the same as were inconsistent with the allegations in the petition, and then (as ultimately amended) alleged in terms as follows:—

3a. The solicitor to the plaintiffs says that if any such suit as stated in the 8th article of the answer was brought in the names of the master and owner of the *Erminia Foscolo*, the bringing of such suit was never authorized or ratified by the plaintiffs, the owners of the cargo of the *Erminia Foscolo*.

4. He says that if any suit was commenced by the owner and master of the *Erminia Foscolo* as in the said 8th article alleged, it was commenced against the owners of the *Delta* only, and not against the *Delta*, and that it was subsequently and before the 22nd of December, 1871, and before the 18th of November, the day of the institution of this suit, and before the 20th day of the same month, the

1876

THE DELTA.
THE ERMINIA FOSCOLO.

day of the appearance of the defendants therein, abandoned by the master and owner of the *Erminia Foscolo*, and the judgment in the 12th article of the said answer stated was and is a judgment of nonsuit only, and not a judgment on the merits.

5. If any such judgment, as in the said 13th article alleged, was delivered by the said Tribunal of Commerce, it was delivered in default of appearance of the said master and owner of the *Erminia Foscolo*, and without any evidence previously given before the said tribunal, and was not, and is not, a judgment on the merits.

6. The said owner and master of the *Erminia Foscolo*, and the said owners of the cargo respectively, were not, nor was nor were either or any of them, at the time of the happening of the said collision, or at any time afterwards, subjects or a subject of France or resident or present therein.

7. The said owner and master of the *Erminia Foscolo*, and the said owners of the cargo respectively, had not any notice of the said alleged decrees within the time allowed by the law of France for an appeal therefrom respectively. (1)

The solicitors for the owners of the *Delta* delivered the following amended rejoinder:—

1. As to article 3a of the amended reply of the plaintiffs, the owners of the cargo of the *Erminia Foscolo* authorized and ratified the said suit.

1a. By the laws of France, apart from any express authority or ratification, the plaintiffs, the owners of the cargo of the *Erminia Foscolo* are, under the circumstances, bound and estopped by the said judgment; and the defendants submit that the law of France is the law applicable to this case.

1b. As to the 4th article of the reply, the solicitors for the defendants deny that at any time before the said 22nd of December, 1871, the said owner and master of the *Erminia Foscolo* abandoned the said proceedings and suits instituted by them in the said Tribunal of Commerce at Marseilles; and they say that the said judgment was final and conclusive, and not a judgment of nonsuit as therein alleged.

2. They deny the allegations contained in the 5th and 7th articles of the said reply.

3. They submit that the allegations contained in the 6th article of the reply are immaterial under the circumstances set forth in the 8th article of the answer.

4. By the law of the kingdom of Italy, and by treaties between France and Italy, heretofore and now existing and in force, and particularly by the treaty between the said countries of the 24th day of March, 1760, it is provided that the Supreme Courts of Italy should be guided by letters of request of the Supreme

---

(1) Previous to the filing of this reply the solicitors for the plaintiffs gave notice that the Court would be moved to reject the admission of articles 7 to 15 inclusive, of the answer in the principal suit, on the ground that articles 7 to 14 were inconsistent with, and did not support, the submission contained in the 15th article. This motion, however, by consent stood over until the hearing.

Courts of France in giving executory force and effect within the said kingdom of Italy to the sentences and judgments of the Courts of France according to law.

5. On the 12th day of February, 1872, the defendants in this suit duly obtained from the Court of Appeal at Aix, in the republic of France, being a Supreme Court of France within the meaning of the said laws and treaties, a letter of request addressed to the Court of Appeal at Genoa, in the said kingdom of Italy, requiring executory force and execution within the said kingdom to be given to the sentences and judgments of the said Tribunal of Commerce at Marseilles alleged in the 12th and 13th articles of the said answer, and the said owner and master of the *Erminia Foscolo* were duly cited to appear before the said Court of Appeal of Genoa to answer to the prayer and request that executory force should be given to the said judgments as aforesaid; the said owner of the *Erminia Foscolo* appeared and opposed the said prayer and request.

6. On the 4th of June, 1872, the said Court of Appeal of Genoa, being a Supreme Court of Italy within the meaning of the said laws and treaties, after hearing the pleadings and exceptions of the said owner of the *Erminia Foscolo*, in opposition and contrary thereto, rejected every exception and petition of the said owner of the *Erminia Foscolo*, and decreed and declared that executory force must be and thereby was given to the said sentences and judgments delivered by the Tribunal of Commerce of Marseilles in the suits respectively brought by the defendants and the owner and master of the *Erminia Foscolo*, as set forth in the answer filed herein, and declared the said judgment to be executory within the said kingdom of Italy.

7. The said judgment of the said Tribunal of Commerce of Marseilles set forth in the 12th and 13th articles of the said answer, and the said judgment of the Court of Appeal at Genoa are, by reason of the premises, valid and binding and conclusive upon the plaintiffs in Italy as well as in France; and by the law of Italy as well as by the law of France the plaintiffs are precluded from recovering any damages from the defendants in respect of the collision alleged in the petition.

8. The defendants repeat the submission contained in the 15th article of the answer.

An amended conclusion was filed by the solicitor for the plaintiffs, denying the truth of the allegations in the rejoinder, and alleging that the same was bad in substance.

The petition and answer in the cross cause were filed under date of the 1st and 21st of February, 1872, respectively. It is, however, unnecessary to set them forth here, as they only contained allegations material to the merits of the collision and the liability of the owner and master of the *Erminia Foscolo* by reason of the negligent navigation of their vessel.

July 30, 1874. The principal and cross causes came on to be heard together before the judge assisted by two of the Elder Brethren of the Trinity Corporation.

1876

THE DELTA.
THE ERMINIA FOSCOLO.

Milward, Q.C., and *E. C. Clarkson*, appeared for the owners of the *Erminia Foscolo* and the owners of the cargo.

The Admiralty Advocate (*Dr. Deane, Q.C.*) and *R. E. Webster*, for the owners of the *Delta*.

The evidence for the plaintiffs and defendant relating to the merits of the case, which had previously been taken orally before examiners of the Court, was brought in, and it was agreed that the witnesses for the *Delta* should be first examined upon the question of law. The counsel for the owners thereupon put in the proceedings of the Tribunal of Commerce at Marseilles (1) and produced and examined as a witness M. Auguste Matthieu of the French bar, who gave evidence as to the nature and effect of the judgments of the Tribunal of Commerce at Marseilles pleaded in the answer in suit No. 5885. During the examination of the witness a question arose as to the amendment of the pleadings, and the Court gave leave to the parties to amend for the purpose of raising the issue whether the judgments of the French Court were not binding and conclusive as an estoppel against the owners of the cargo of the *Erminia Foscolo* as well as the owners of that ship.

The question of law was then adjourned for further hearing, but the Elder Brethren of the Trinity Corporation being in attendance, the Court considered it advisable, with the consent of the parties, to proceed to the trial of the case upon the merits. After hearing the counsel on both sides the Court pronounced (de bene esse) that the *Delta* was alone to blame for the collision.

July 10, 1876. The pleadings having been amended, the reserved question of law came on for further hearing, and such hearing was continued on the 11th of July.

The examination of M. Matthieu was continued, and further evidence with respect to the nature and effect of the proceedings in the French and Italian courts, both so far as the owners of the *Erminia Foscolo* and the owners of the cargo were concerned, was

(1) By certificates which formed part of such proceedings, it appeared that copies of the citation of the master and owner of the *Erminia Foscolo* on the 9th of September, 1871, at the suit of the owners of the *Delta*, and copies of the judgments of the 22nd of December, 1871, had been left for the master and owner of the *Erminia Foscolo* respectively at the office of the Procureur of the French Republic at Marseilles.

given by French and Italian advocates, who referred to the following authorities as containing the French and Italian law on the subject: French Civil Code, Art. 14; French Code of Civil Procedure, Arts. 135, 150, 155, 156, 157, 159, 434, 469; French Commercial Code, Arts. 435, 436, 643; Dalloz Jurisprudence Générale, 1868, Part II. p. 10; Treaty of the 24th of March, 1760, between France and Sardinia (1); Treaty of the 11th of September, 1860, as to the interpretation of paragraph 3 of Article 22 of the first-mentioned treaty (2) (3); Italian Code of Civil Procedure, Art. 10; Italian Commercial Code, Arts. 536, 537, 566.

The proceedings in the Court of Genoa were proved in evidence, together with a certificate from an officer of the Tribunal of Commerce at Marseilles that, up to the date when such certificate was drawn up, 23rd of July, 1874, there had been no steps taken to oppose the judgments delivered on the 22nd of December, 1871, in favour of the owners of the *Delta*. The owner of the *Erminia Foscolo* and the manager of the London firm who were the owners of the cargo of the *Erminia Foscolo* were examined, and the latter stated that the owners of the cargo of the *Erminia Foscolo* had never sanctioned or ratified the proceedings commenced by the owner of the *Erminia Foscolo* before the Tribunal of Commerce at Marseilles, and, in fact, at the time had no notice at all that any such proceeding had been taken.

From the evidence of another witness produced on behalf of the plaintiffs it appeared that the judgments of the Tribunal of Commerce at Marseilles in favour of the owners of the *Delta* had not been satisfied.

Milward, Q.C., and *E. C. Clarkson*, argued for the owner of the *Erminia Foscolo* and the owners of her cargo. The judgments of the French Tribunal of Commerce at Marseilles and the subsequent

(1) "Traité entre le Roi de France, Louis XV., et le Roi de Sardaigne, Charles Emmanuel, conclu a Turin, pour regler les limites de leurs Etats;" see Wencker Codex Juris Gentium recentissimi, vol. iii. p. 218. Leipsic, 1795, where the treaty is given in extenso, and De Clerq Recueil des Traités de la France, tom. i. p. 80.

(2) "Déclaration échangée à Turin le 11 Septembre, 1860, entre la France et la Sardaigne pour l'exécution réciproque des decrets et jugements des cours superieurs;" see De Clerq Recueil des Traités de la France, vol. viii. p. 118.

(3) Copies of these treaties, authenticated under the provisions of 14 & 15 Vict. c. 99, s. 7, were put in as evidence.

1876

THE DELTA. THE ERMINIA FOSCOLO.

proceedings in Italy can work no estoppel in this case, for there has been no judgment either in the French or Italian court disposing of the merits of the case; the decision of a foreign Court by default cannot in such circumstances as exist in the present case be treated as final and conclusive. At the time of the institution of the suit against the *Delta* in this country the judgments in the French court had not been delivered, and therefore the defendants, in order to succeed on the plea of res judicata, must contend that an estoppel could come into existence during the progress of the proceedings here; such a proposition is untenable. In fact the owners of the *Delta* ought to have taken a similar course to that pursued in the case of *The Mali Ivo* (1), and have pleaded the pendency of the suits abroad. The Court then in its discretion might have put the plaintiffs to their election which set of proceedings they would proceed with, the proceedings in this court or the proceedings abroad. As this course has not been taken, it is clear that the Court can examine into the judgments delivered at Marseilles: *Don* v. *Lippman* (2), and ought not to disregard the fact that such judgments have up to this time remained unexecuted. It cannot be said here that the same matter or cause of action has already been finally adjudicated on between the parties by a Court of competent jurisdiction, that is, that the same identical matter has come in question already in a court of competent jurisdiction, and has been there controverted and finally decided: *Langmead* v. *Maple.* (3)

The Admiralty Advocate (*Dr. Deane, Q.C.*) and *R. E. Webster*, for the owners of the *Delta.* It does not concern the Court to inquire whether the foreign judgments relied on by the defendants, the owners of the *Delta*, were by default or on the merits. The only question is, has there been a res judicata? that is, has there been on the matter in question in the principal suit here a decision of a competent Court, to whose jurisdiction the same persons as are before the Court here were subject? This question must be answered in the affirmative. The master and owner of the *Erminia Foscolo*, by instituting in France the suit they afterwards abandoned, selected the French Court as a tribunal having jurisdiction

(1) Law Rep. 2 A. & E. 356. (2) 5 Cl. & F. 1.
(3) 18 C. B. (N.S.) 255, 270.

over them; they are clearly therefore bound by the proceedings there. On this point the case of *Schibsby* v. *Westenholz* (1) is an authority. In the judgment in that case the following passage occurs: "Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him." (2) No doubt, the judgment of a foreign Court cannot in some cases be enforced against a non-resident foreigner, because there is no duty imposed on such foreigner to obey the judgment. But the case is different where, as here, persons have agreed to be bound by the decision of a foreign Court, or have voluntarily appealed to it for the protection of their interests. [They referred to *Copin* v. *Adamson* (3), *Tarleton* v. *Tarleton* (4), and *Vallee* v. *Dumergue.* (5)] The owners of the *Delta,* though they might have applied to have the proceedings here dismissed on the ground of there being a lis alibi pendens, were not bound to do so. The French judgments were pleaded as soon as possible after they were delivered, and if, as we contend, they are final and conclusive and a peremptory bar to the suits here: (Digest, p. 44, title 1, 2; Story's Conflict of Law, sec. 598; Westlake's Private International Law, p. 376; Marten's Précis du Droit des Gens, edited by Vergé, t. 1, l. 3, sec. 94; *General Steam Navigation Co.* v. *Guillou* (6)); the Court will not reject the plea of res judicata merely on the ground that it was pleaded too late. With regard to the effect of the judgments in the French Court, it must not be forgotten that although the judgment in the suit brought by the owners of the *Delta* at Marseilles was a judgment rendered for want of appearance, yet to some extent at least the Court would seem to have taken into consideration the merits of the case.

Milward, Q.C., replied.

Cur. adv. vult.

July 25, 1875. SIR ROBERT PHILLIMORE. These are cross causes of collision brought originally in the High Court of Admi-

(1) Law Rep. 6 Q. B. 155.
(2) Law Rep. 6 Q. B. at p. 161.
(3) Law Rep. 9 Ex. 345; 1 Ex. D. 17.
(4) 4 M. & S. 20.
(5) 4 Ex. 290; 18 L. J. (Ex.) 398.
(6) 2 M. & W. 877.

1876

THE DELTA. THE ERMINIA FOSCOLO.

ralty: the first by the owner of the barque *Erminia Foscolo* and the owners of her cargo against the steamship *Delta;* the second by the owners of the *Delta* against the *Erminia Foscolo.* In the suit against the *Delta* the pleadings, besides narrating in ordinary form the incidents of the collision, raise a further issue or further issues in the following manner. Articles 7 to 15 inclusive of the answer as amended are as follows:—[His lordship here read the last nine paragraphs of the amended answer in the principal cause.] To this articles 3 to 7 inclusive of the reply are as follows:—[His lordship here read the last five articles of the amended reply in the same cause.] And the rejoinder is as follows:—[His lordship here read the rejoinder above set out.] The pleadings in the suit against the *Erminia Foscolo* merely raise the issue as to the blameworthiness of the two vessels. When the cases came on for hearing, by arrangement, this last question was determined first; and on the merits I have found the *Delta* alone to blame for the collision.

The point, however, remains, on which evidence of foreign jurists and others has been since taken, and which was finally argued on the 10th of this month, whether the questions in dispute between the parties had not previously been determined by another competent Court, so that the matter was in the category of one of res judicata.

The collision occurred on the 11th of August, 1871, off Gibraltar. On the 9th of September, 1871, the captain and owners of the *Delta* instituted a suit in the Court of Commerce at Marseilles against the captain and owner of the *Erminia Foscolo.* On the 12th of September a suit was instituted in the same Court by the owner of the *Erminia Foscolo* against the owners of the *Delta.* Some adjournments of the two suits were had; and on the 22nd of December the tribunal, in the suit brought against the captain and owner of the *Erminia Foscolo,* pronounced judgment against the defendants for default of appearance, condemning them in the plaintiff's damages and costs. On the same day the tribunal, in the suit brought against the owners of the *Delta,* pronounced judgment against the plaintiff for default of prosecution, condemning him in costs.

By a treaty of 1760 between France and the kingdom of Sar-

dinia, the supreme commercial Courts of either country were to execute the decrees of each other.

A petition was presented by the owners of the *Delta* to the Court of Appeal at Aix praying that Court to put in force the provisions of this treaty by sending letters of request—réquisitoires lettres rogatoires—to the Court of Appeal at Genoa, and such letters were accordingly decreed by the Court at Aix on the 12th of February, 1872.

On the 24th of February a citation out of the Court at Genoa was served on the owner of the *Erminia Foscolo;* a further citation seems to have been served on the 12th of March; and on the 4th of June, the Court at Genoa having heard argument on both sides, decreed that executive force must be given to the judgments of the Court of Commerce, and condemned the owner of the *Erminia Foscolo* in costs. Some attempt seems to have been then made to execute these judgments, but ultimately they remained unexecuted. In the meantime the suits in the High Court of Admiralty had already been instituted. That against the *Delta* was instituted on the 18th of November, 1871, and an appearance was entered for the owners of the *Delta* on the 20th, that appearance being not under protest, but absolute. The suit against the *Erminia Foscolo* was instituted on the 13th of January, 1872, and an appearance was entered on the same day.

The judgments in the Court of Commerce were not given until the 22nd of December, 1871; so that at the time of the institution of the suit here against the *Delta,* and of the appearance of the owners of the *Delta,* the suit in the Court of Commerce had not passed into a res judicata, but was only a lis alibi pendens.

Even after the judgment in the Court of Commerce the owners of the *Delta* instituted their suit here against the *Erminia Foscolo,* and filed pleadings in that suit in which no mention is made of the judgment of the Court of Commerce.

On the questions of foreign law both French and Italian advocates were examined. Their evidence left it at least doubtful whether the judgments of the Court of Commerce, given as they were in default of appearance or prosecution, and never having been executed, would now have in France or Italy the force of res judicata.

1876

THE DELTA. THE ERMINIA FOSCOLO.

But I think it unnecessary to go into their evidence in detail, as I am of opinion this defence must fail, for two reasons: the first is that at the time when the suit against the *Delta* was begun there was confessedly no res judicata; there was only a lis alibi pendens; and if the owners of the *Delta* had wished to escape from having two suits against them for the same matter brought to a hearing, they should have put the owners of the *Erminia Foscolo* to their election, compelling them to abandon one or the other of the suits, according to the rule laid down by me in *The Mali Ivo* (1), and quite recently applied in the *Catterina Chiazzare.* (2)

As regards the suit against the *Erminia Foscolo*, that was brought by the owners of the *Delta* while the foreign lis was pending; they cannot be heard, therefore, to object that that lis is a bar to a decision on the merits in this suit.

The second reason is that the foreign judgments not having been given on the merits of the case, but on matters of form only, cannot be set up as a bar to a decision on the merits. It is, however, upon the former ground that this judgment is principally founded. I have already pronounced the *Delta* to be alone to blame for the collision. I must now pronounce that the further defence raised on behalf of the owners of the *Delta* is not sustained, and that they must be condemned in the damages occasioned by the collision, and in the costs of the suit; and I must dismiss the suit against the *Erminia Foscolo* with costs. (3)

Solicitor for owners of the *Erminia Foscolo* and owners of her cargo: *Cooper.*

Solicitors for owners of the *Delta*: *Gellatly, Son, & Warton.*

(1) Law Rep. 2 A. & E. 356. (2) Ante, p. 368.
(3) See *Meyer* v. *Ralli*, 1 C. P. D. 358.

W., FALSELY CALLED R., *v.* R.

1876
Aug. 2.

Suit for Nullity—Impotence—Delay—Insincerity of Complaint.

In August, 1875, a wife, then aged 47, instituted a suit for a declaration of the nullity of a marriage contracted in May, 1849. There was evidence that the petitioner was virgo intacta, and that the respondent was incurably impotent. The petition was dismissed, the Court being of opinion that there was no satisfactory explanation of the delay in taking proceedings, and that the proceedings had been taken partly in consequence of the disagreements and quarrels between the petitioner and the respondent, and not with the single object of obtaining redress for the injury done to the petitioner by the respondent's incapacity.

THIS was a wife's petition for a decree of nullity by reason of the husband's impotence. The husband had entered an appearance, but had filed no answer. The facts are fully stated in the judgment. The cause was heard on the 7th and 13th of July, 1876.

Bayford, for the petitioner. If the Court is satisfied that the marriage has never been consummated, and that the non-consummation is owing to the incurable incapacity of the husband, and that the petitioner is sincere in her desire to obtain relief, she is entitled to a decree, whatever may be the age of the parties at the time of taking proceedings. Mere delay is no bar to the suit.

[The following authorities were cited: Ayliffe's Parergon, p. 227; Bishop on Marriage and Divorce, bk. iii. c. 6; *B.* v. *B.* (1); *A.* v. *B.* (2); *G.* v. *T.* (3); *H.* v. *C.* (4); *M.* v. *B.* (5); *M.* v. *C.* (6); *Pollard* v. *Wybourn* (7); *L.* v. *H.* (8)]

Cur. adv. vult.

Aug. 2. SIR ROBERT PHILLIMORE. This is a suit for nullity of marriage by reason of the incurable mal-conformation and conse-

(1) 1 Adm. & Eccl. 248.
(2) Law Rep. 1 P. & M. 559.
(3) 3 Sw. & Tr. 312; 33 L. J. (P. M. & A.) 37.
(4) 1 Sw. & Tr. 605; on appeal, 9 H. L. C. 186; 31 L. J. (P. M. & A.) 103. 6 Jur N S 1.
(5) 3 Sw. & Tr. 550; 33 L. J. (P. M. & A.) 203.
(6) Law Rep. 2 P. & M. 414; on appeal, Law Rep. 2 H. L., Sc. 300.
(7) 1 Hagg. Eccl. 725.
(8) 4 Sw. & Tr. 115; reported as *X.* v. *Y.*, 34 L. J. (P. M. & A.) 81.

1876

W.
v.
R.

quent impotence of the husband at the time when the marriage was contracted.

The petition in this case was filed on the 12th of August, 1875. The marriage was celebrated on the 13th of May, 1849. The suit was instituted, therefore, after a lapse of more than twenty-six years. The parties were in the middle class of life, the husband being a journeyman hairdresser, and the wife had some little property of her own, producing an income of about 26*l.* a year. She is rather more than forty-seven years old. The husband has appeared in the suit, but not answered. The examination of the husband's person by physicians appointed by the Court proves his incapacity to be incurable, and the wife is reported by them to be virgo intacta. The other principal facts are these:—The husband made an attempt to consummate the marriage on the first night of their cohabitation. It was unsuccessful. This was not repeated till after a long interval, and only on two occasions. They cohabited together at Stourbridge for a year and nine months. The wife has been examined—the only witness except the medical men. She says that she spoke to him about his physical condition; he said he was "sensitive, delicate, not like other men." After a year and nine months they separated, the wife says, "because he ill-treated me, and because we did not live comfortable." The wife went to her uncle and aunt, who kept a clothes shop, I think, near Stourbridge. There the wife resided no less a time than nine years; and she says, and it is remarkable, that she never mentioned to her uncle and aunt any other reason for leaving her husband than that he had thrown a candlestick at her. During all this long period she never mentioned to her aunt—a married woman—that her husband had never consummated the marriage. In consequence of a letter from her husband, promising to be a good husband to her if she would return, she did return to him after a lapse of nine years, and stayed with him five years and six months. One other attempt only at consummation was made. They quarrelled, she says; he ill-treated her, had a violent temper, pushed her down; she determined to leave him on account, she said, "of his ill-treatment, and the other reason as well." In 1865 she packed up her clothes and things in a bundle; he took it from her; she went

nevertheless to her uncle and aunt, and never returned to her husband. She told her aunt that she had left her husband because he had taken her things. It appears to have been at Christmas, 1865, that she went back to her uncle's house. He died in August, 1866. Her aunt died in 1869. Before her death in that year the petitioner mentioned for the first time to her aunt the non-consummation of her marriage in the presence, it should seem, of Mr. Humphrey, a solicitor. Her aunt said "she would see her righted if she lived." And something seems to have been said about legal proceedings. None were taken, however, and the petitioner went to live in Hogley Road, and there remained till 1875. She says that in March of that year she heard accidentally from a friend of a case similar to her own in which legal proceedings had been taken, and then "the light flashed upon her mind" that she might be free, and in August she filed her petition.

She was not a satisfactory witness, deposing with hesitation and uncertainty to the facts which I have stated; but I have no doubt from the answers which she made to me that but for the quarrel with her husband, the disagreement of their tempers, and the uncomfortable life which they led in consequence, she would not have brought this suit.

I do not believe that if she had had any serious sense of an injury done to her by the incapacity of her husband she would for so many years have altogether abstained from mentioning the subject to her married aunt, who appears to have been in the relation of a mother to her, and to whom it is remarkable that she gave another and different reason for leaving her husband's house.

Now the law which governs these cases is peculiar. The marriage is not void, but voidable by a judicial sentence. The contract of marriage differs generally, and in some respects materially from other contracts. It cannot be dissolved at the pleasure of the parties, nor can it be annulled at any period of the married life even when one of the parties by a physical incapacity has been unable to perform some of the duties incident to it. For instance, could it be maintained that either husband or wife could at the age of eighty set aside their marriage on the ground that one of the two parties had, sixty years ago, been visited with

1876

W.
v.
R.

an affliction of mal-conformation? The law would surely hold that the complaint was, according to Lord Stowell's expression, "insincere," that the party complaining had made his or her election to abide by the contract, and would apply the canonist's maxim "Habeat tanquam soror vel tanquam frater." The law would be very inhuman if it allowed the husband after a long cohabitation, without any satisfactory explanation of the delay, to throw his wife in her middle or old age, with ignominy, shame, and poverty, upon the world because she had been originally, however innocently, by physical causes incapacitated from performing some of the duties of the married state. The law, therefore, has always required sincerity in the complainer, that is, a real sense of the grievance complained of unmixed with any other subsidiary motive, and, as a necessary proof of such sincerity, has also required all reasonable promptitude to be exhibited by the complainer in seeking legal redress. Perhaps there is no state of things to which the maxim, Vigilantibus non dormientibus subveniunt leges, is more directly applicable. This exposition of the law will be found in many reported cases. In none perhaps is it more clearly laid down than by the Privy Council in a case in which that most experienced ecclesiastical judge, Dr. Lushington, delivered the sentence. In *B.* v. *B.* (1), Dr. Lushington said: "Their Lordships are of opinion that cases might occur where long acquiescence with knowledge, or the means of procuring knowledge, would operate as a bar to the prosecution of such a suit, and more especially if the circumstances shewed that the suit was brought, not on account of the evils resulting from such imperfection, but for other and different reasons. The authorities with regard to lapse of time, and the effects thereof, are few, and these suits, till of recent years, have been so rare that it was highly improbable that much could be found on this head. As might be expected, these authorities do not specify any particular lapse of time since the marriage as forming a bar to the institution of a suit of nullity, and for very obvious reasons. In almost every case falling within this category the circumstances differ; in some cases the delay may be satisfactorily accounted for, though apparently of long duration, in

(1) 1 Eccl. & Adm. at p. 261.

others, though the lapse of time may have been of briefer duration no reasonable cause for not commencing the suit earlier may appear. The result of all the cases about to be cited will shew that great delay in the institution of a suit of this description by the husband has always been considered an objection to be accounted for. In the case of *Guest* v. *Guest* (1) Lord Stowell thus expressed his opinion:—'The length of time which has elapsed is in itself almost a bar, for I do not remember any instance in which such a suit has been allowed to be instituted after such an interval. That a period of seven years should be allowed to elapse in a case where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted.' It is true that in that case Lord Stowell held the suit to be barred on another and a totally different ground, namely, that in a previous suit brought by the wife for separation on account of adultery, the husband had admitted the marriage,—still though not a decision, it is the expression of an opinion from the highest authority, and is justly entitled to great weight. Again, in the case of *Briggs* v. *Morgan* (2), Lord Stowell, though the case was not decided on that ground, declared his opinion that a delay of even sixteen months unaccounted for was a proof of insincerity.

"From the passage above cited, it appears that it was clearly the opinion of that eminent judge, that delay in the commencement of a suit of this description required to be accounted for, and might, with other circumstances, constitute a bar. In these cases the Court abstained from giving any opinion as to the mere lapse of time, but held it to be an important ingredient.

"The inquiry, therefore, in the present case will be whether the lapse of time is accompanied with other facts which prove, to use Lord Stowell's expression, the insincerity of the suit, or, in other words, that whatever may be the defect of the wife, it was not a grievance to the husband or the real cause why the suit was brought."

In 1861, in *Castleden* v. *Castleden* (3) Lord Chancellor Campbell gave a judgment in the House of Lords, in a case of nullity,

(1) 2 Hagg. Cons. 323. (2) 2 Hagg. Cons. 329.
(3) 9 H. L. C. at p. 191.

1876

W.
v.
R.

founded on the principle that lapse of time coupled with an indirect motive, was of itself an absolute bar.

In a judgment delivered in 1872 in *M., falsely called C.*, v. *C.* (1), Lord Penzance said, "She (the wife) had, if her story is trustworthy, for two years at least, known of her husband's impotency, and had resented it, and yet, so far as appears in evidence, to no member of her family or friend did she then make any allusion to the wrong from which she now alleges she had all along suffered. She might not indeed have been aware of the possibility of such a suit as this, but it is hardly credible that this wrong if it existed should not, at least to her female relations, have found utterance at such a time, and have been included among the grievances which she then laid to her husband's charge. In the face of this conduct on her part, bearing in mind that the oath of the respondent is set against hers throughout, and that the onus of proof lies upon her, I cannot judicially hold that she has established the facts upon which she claims relief. But if she had, some impediments would still remain. Relief in suits of this nature is never accorded by the Court unless the petitioner be prompt in seeking it and sincere in the motive for doing so. I cannot hesitate to say that if the petitioner was, as she alleges, made cognisant within four or five years after her marriage of her husband's impotency, she could not have delayed these proceedings for three years more without being open to the charge of want of sincerity or promptitude. In saying this I am not forgetful of the fact that she may not have known that such a suit as this could be entertained. But the requirements of promptitude could never be enforced by this Court if it were first necessary to prove the existence of such knowledge. The general circumstances of each case and the facilities of the parties aggrieved for obtaining legal advice and assistance will vary indefinitely, but the conditions to which I have alluded mean nothing if they do not mean this—that the petitioner is bound to have evinced impatience under a sense of wrong and a reasonable activity in complaint and redress. The Court cannot recognise these features in the conduct of the petitioner. On the contrary, she appears to have lived contentedly enough with her husband, until, as she says, he ill-treated her; and

(1) Law Rep. 2 P. & M. 414.

if Mrs. M.'s impression was correct, she was more moved to the institution of this suit when she first found that it was open to her by the prospect of getting quit of the burthen of supporting the respondent than by anything else."

In the case before me the wife has been married more than twenty-seven years, and is in her forty-eighth year, an age when neither the procreation of children nor the gratification of the passions,—two of the various ends of marriage which usually lead to the institution of these suits,—can reasonably be expected. The delay is much longer than any I believe which has hitherto occurred in these causes, and it is not satisfactorily accounted for. The wife does not, in my opinion, bring the suit for the single object of redress on account of the impotency of her husband, but for another reason also.

Upon all these grounds, I refuse to grant the prayer of the wife, and dismiss the husband from the suit.

Solicitor for petitioner: *E. Byrne.*

[IN THE COURT OF APPEAL.]

May 3.

THE LIMERICK. (7318.)

*Bond—Collision—Liability of Master—Disbursements—*24 *Vict. c.* 10, *s.* 10.

The master of a vessel which, by his default, had been in collision with another vessel in a foreign port, gave a bond for payment of the damages, and so released the vessel:—

Held, in an action for wages and disbursements brought by the master, that as against the mortgagees of the vessel the amount of the penalty of the bond would not be retained in Court to meet any claim which might be established against the master under his bond.

THIS was a cause of wages and disbursements carried on on behalf of the master of the steamship *Limerick* against the vessel, and against C. J. Jutson, an alleged mortgagee of the vessel, intervening as defendant.

The plaintiff claimed to recover in the action, inter alia: 1. A sum of 200*l.*, being the amount of the penalty of a bond given by

1876

THE LIMERICK.

him to release the vessel from detention on account of a collision between the *Limerick* and a vessel called the *Skitty Belle,* which occurred in a foreign river, the collision being apparently caused by default of the master. 2. A sum of 102*l.* 0*s.* 2*d.* for which, as he alleged, he was liable to Messrs. Dowson & Worth, shipbrokers, on a bill for repairs to the vessel.

Sir R. Phillimore, judge of the Admiralty Division, made an order to the effect that the plaintiff was entitled to have retained in court the sum of 200*l.*, to meet any liability under his bond, and to receive the 102*l.* 0*s.* 2*d.* as part of a larger sum payable to him for disbursements on account of the ship, as reported, ante, p. 292, where the facts are fully stated.

The defendant appealed.

E. C. Clarkson, for the defendant. The claim for disbursements is a creature of the Act of 1861 (24 Vict. c. 10, s. 10), and the master must shew that he comes under its provisions. As to the bond, the master has, in fact, admitted that the damage was occasioned by his own fault, and he will therefore be liable to his owners if they are compelled to pay, and he is liable to the owners of the foreign ship: he cannot be put in a better position because he gave the bond.

Watkin Williams, Q.C., and *W. G. F. Phillimore,* for the plaintiff. As to the 200*l.*, the owner may be liable and the master not liable in cases of collision. There is no evidence that he would be liable over again to the owners. They may have sent him to a dangerous place, and have ordered him to run the risk; or the mate may have been in charge. The owners would never have attempted to recover from the master the damages they might have to pay.

JAMES, L.J. As to the allowance of 102*l.* 0*s.* 2*d.* for repairs, the judge of the Admiralty Division came, in my opinion, to a right conclusion, and that part of his order must stand. The plaintiff is liable to Dowson & Worth if the debt was contracted under such circumstances as would enable them to elect whom they would sue, the owners or the master, and, in my opinion, it was so contracted.

As to the other point, it appears on the evidence, and from the statement of the captain, and on the face of the bond, that he was a wrongdoer, and he cannot on any reasonable principle charge as a disbursement against his principal money which he may have to pay by reason of his own wrongdoing; he did the mischief, and if he has to pay the money under the bond, he could not recover it against his principal as a disbursement.

BAGGALLAY, J.A. I am of the same opinion.

LUSH, J. I also am of the same opinion. As to the first point, I agree with my Lords. As to the second point, it was contended that giving the bond was the best thing the master could do for the owners. I agree that having done the wrong, he was bound to do his best at any sacrifice, and though in this sense it was the best thing for the owners, he has not thereby acquired any right to charge the owners for money paid in respect of any liability incurred through his own wrongdoing. Had there been any doubt about it, he would have been re-examined on the point, but it is clear that the accident happened through his own default, and the money cannot be retained.

Order affirmed as to the debt; reversed as to the bond.

Solicitors for plaintiff: *Lowless & Co.*
Solicitors for defendant: *Linklater & Co.*

1875
July 22.

THE PETER DER GROSSE. (6972.)

Damage to Cargo—Onus of Proof—Bill of Lading—Weight, Contents, and Value unknown.

The master of a Russian ship received on board his vessel at St. Petersburg certain goods under bills of lading in the ordinary form:—"Shipped in good order and condition, &c., to be delivered in the like good order and condition at the port of London." Certain excepted perils were enumerated in the bills of lading, and in the margin thereof were the words, "Weight, contents, and value unknown." The ship arrived at London, and the goods were delivered to the consignees, but a great number of them were found to be in a damaged state. At the hearing of a cause under the 6th section of the Admiralty Court Act, 1861, instituted on behalf of the consignees against the ship, it was proved that the damaged goods were, when taken out of the ship, in an unmerchantable state, and damaged both externally and internally, and that the damage was recent, and not traçeable to any inherent vice in the goods:—

Held, that, in the absence of any satisfactory proof on the part of the ship-owners that the goods were in bad condition when shipped, it was not incumbent on the plaintiffs, in order to establish their case, to prove where or how the goods became damaged:

Held, that the bills of lading afforded evidence that externally, and so far as met the eye, the goods had been shipped in good order and condition.

THIS was a cause instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of Messrs. Schoetensack, Riecken, & Co., of London, merchants, consignees of cargo laden on board the Russian vessel *Peter der Grosse*, against the said vessel and against the St. Petersburg Steamship Company of St. Petersburg, the owners of the said vessel intervening as defendants.

The petition contained the following allegations:—

1. In the month of June, 1874, Scheumann & Spiegel shipped on board the above-named Russian vessel *Peter der Grosse*, then lying in the harbour of St. Petersburg, seventeen bales of down and eight bales of feathers respectively, in good order and condition. And the master of the said vessel accepted and received the same, to be carried on board the said vessel from St. Petersburgh to London, and to be then delivered to the plaintiffs upon the terms of five bills of lading duly signed and delivered by the said master to the said Scheumann & Spiegel. The said bills of lading were and are all of the same tenor and date, and were and are in the words and figures following:—

"Shipped in good order and well-conditioned by Scheumann & Spiegel in and upon the good steamship, called the *Peter der Grosse*, whereof is master for this

present voyage H. Yodtmann, now lying at anchor in the harbour of St. Petersburgh, and bound for London.

7	bales	Down, gross weight	35p.	38lb.
10	„	do. „	51p.	15lb.
5	„	Feathers „	25·p	27lb.
3	„	do. „	15p.	16lb.

being marked and numbered as in the margin, which are to be delivered in the like good order, and well-conditioned, at the aforesaid port of London (the act of God, the Queen's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the seas, rivers, and steam navigation, of whatever nature and kind soever excepted) unto Messrs. Schoetensack, Riecken, & Co., or to their assigns, he or they paying freight for the said goods, at 70/d. Stg. pr. ton, gross weight in full, with primage and average accustomed. In witness whereof the master or purser of the said ship hath signed 5 bills of lading all of this tenor and date, one of which bills being accomplished, the others to stand void.

"Dated in St. Petersburg, the 8 June, 1874.

"H. Yodtmann.

"Not accountable for accidents from fire at sea or on shore. Weight, contents, and value unknown. These goods, if not taken out within 24 hours after ship's arrival, the master to be at liberty to enter and land the same at the consignee's expense and risk."

2. The said ship proceeded on her voyage with the said bales of down and feathers on board her, and duly arrived therewith in the port of London.

3. The plaintiffs, who were and are the consignees of the said bales of down and feathers within the meaning of s. 6 of the Admiralty Court Act, 1861, did all things on their part necessary to entitle them, and became entitled, to have the said bales of down and feathers delivered to them in like good order and well-conditioned as when shipped on board the said ship as aforesaid; but the defendants and the master of the said ship did not deliver the said cargo to the plaintiffs in such good order and condition, but, on the contrary, delivered a great number of the said bales in a much worse order and condition, and saturated with and damaged by some offensively smelling matter.

4. The defendants were not prevented by any of the perils or matters excepted in the said bills of lading from delivering the said bales of down and feathers to the plaintiffs in as good order and condition as they were in when shipped as aforesaid.

5. The defendants and the master of the said ship neglected to properly stow the said cargo, or improperly stowed it in juxtaposition to other goods, or neglected to take proper care to preserve the said cargo from being damaged.

6. By reason of the premises, the plaintiffs have lost a great part of the value of the said down and feathers, and have been put to a great expense about the same.

On behalf of the defendants the following answer was filed:—

1. The solicitors for the defendants deny the allegations contained in all the articles of the said petition, save and except the second article.

1875

THE PETER DEN GROSSE.

2. The said loss or damage was not occasioned by any negligence, breach of contract, or breach of duty of or on the part of the defendants or their servants.

3. The said alleged damage was occasioned by a vice inherent in the said down and feathers.

4. The said down and feathers had, when put on board, a considerable amount of animal matter therein, and were improperly cured.

5. The said goods were received on board the said ship and were carefully and properly stowed, and every care was taken by the defendants and their servants to preserve the said goods from damage, and the said damage was not occasioned wholly or in part by improper stowage.

6. The said down and feathers were not stowed in juxtaposition to other goods of an offensive nature, and no goods were shipped on board the said ship which could possibly have occasioned any damage to the said down and feathers.

The case came on to be heard on oral evidence on the 21st of July, 1875, and the hearing was continued on the 22nd of July.

The result of the evidence appears from the judgment.

A. L. Smith and *Charles Hall*, for the defendants. The plaintiffs have not made out their case. They have not succeeded in proving that the damage done to the goods in this case resulted from the default of the defendants: *The Ida.* (1) It must be admitted that, where a clean bill of lading has been given, a presumption that the goods were shipped in good order and condition is created against the shipowners, and the goods, if delivered damaged, will be considered to have been damaged during the voyage, unless this presumption is rebutted. This presumption, however, cannot arise when goods have been shipped under a modified bill of lading, as was done in the present case. The effect of the note on the margin of the bill of lading is to prevent any such presumption arising. Thus, in *Jessel* v. *Bath* (2), the marginal note, "Weight unknown," entirely nullified the statement of weight in the body of the bill of lading. Similarly here the words "Contents unknown" throw the burthen of proof on the plaintiffs. The plaintiffs have not established even a primâ facie case that the damage occurred from the neglect or default of those on board the ship. The bill of lading, even without the marginal note, would be no estoppel, and the evidence on behalf of the defendants would be sufficient to rebut any presumption to be drawn from bill of lading terms; whilst, if due effect be given to the words in the

(1) 2 Asp. Mar. Cas. 551. (2) Law Rep. 2 Ex. 267.

margin, the plaintiffs have certainly not succeeded in discharging the onus of proof incumbent on them, much less have they displaced the case set up on the part of the defendants.

E. C. Clarkson and *W. G. F. Phillimore*, for the plaintiffs. The plaintiffs do not claim to put the bill of lading, modified as it is by the note, "Contents unknown," higher than this, that it supplies clear evidence that the external condition of the goods when shipped was good. Now positive evidence has been given that the same goods were received from the ship in a dirty—in an unmerchantable condition. Surely the statement, "Contents unknown," cannot be taken to have the force of a declaration that the goods were unmerchantable. The bad condition of the bales when landed was apparent to everybody, and, assuming the bill of lading to afford, as the plaintiffs contend it does, evidence that the external condition of the goods when shipped was good, the only question to be determined really is, Did this bad condition come from an external or an internal cause? The evidence goes to prove that the bales were damaged from some external cause, and that the feathers contained in the bales were free from inherent vice. If this be so, it is immaterial to inquire whether the bill of lading supplies evidence that the internal condition of the bales when put on board was good. Moreover, it cannot be incumbent on the plaintiffs to go further and shew conclusively how the damage was caused.

SIR ROBERT PHILLIMORE. This suit relates to seventeen bales of down and eight bales of feathers which were placed on board the vessel *Peter der Grosse* in the month of June, 1874.

There is no question whatever as to the fact that these bales were taken out of the ship in a bad condition—in what one of the witnesses has called a not merchantable condition. The question which the Court has to determine upon the evidence before it is, whether the plaintiffs have succeeded in maintaining the position that these bales were put on board in good order, and that, therefore, the damage must have occurred from some cause with which the plaintiffs may not be acquainted, but which could not arise from the state of the cargo itself when put on board the vessel.

1875

THE PETER DER GROSSE.

Now the bill of lading says:—[His Lordship here read the bill of lading.]

The vessel made a very long voyage, was six weeks before she reached the port of her destination, and she was detained by the necessity of repairs at Revel for seventeen days.

The evidence as to the state of the bales when they were taken out is important, not only with respect to the latter part of the case, but in respect to the former part.

Soon after their arrival early intelligence was given by the consignees of their objection to the state of the cargo. I need not enter into the details of the letters which passed as to the state of these goods when they arrived.

One fact is very clearly established by all the witnesses, and is undisputed in the case, that the feathers were of the very best class, and the down also, that could be imported. They were surveyed by two gentlemen experienced in the business, one appointed by the consignees and one by the shipowners. Mr. Brooks was the person appointed by the consignees, and he surveyed the feathers and down in company with another gentleman, whose name was Blumenthal, and he gives evidence that a clerk was present from Messrs. Bailey & Leetham, who were the representatives of the owners of the ship during the time, and he put in a report. The essential part of his report was, that the bales emitted a very bad smell, which smell was, to use the expression of the witness, foreign to the natural smell of feathers, and in his opinion, also, the damage to them must have come from the outside. He said there was no appearance of heat, the outside of the canvas bags in which these feathers were placed was more or less dirty. I think it was stated that they were bags five feet high or thereabouts and three feet broad. He said they were stained with a black stain, and they also smelt more or less. That is the substance of the evidence given by Mr. Brooks. Mr. Blumenthal, who, as I said, was appointed on behalf of the shipowners, says that he deals in down and feathers, and he understands that business, and he surveyed these bales, and he states that the outside was as if some liquid had been poured over them, while the inside had an offensive smell more or less through it, certainly not a natural smell, something quite strange to the

article. And then another witness was examined, also conversant with what is called the feather business, a gentleman of the name of Worrall, who said he imported a great deal, and that he bought a parcel of feathers from the plaintiffs in this case by sample; he afterwards refused to take the feathers on account of the condition in which they were; he said that he got a notice that the goods were damaged; that he went down to the quay the next morning and found every bag stained more or less in the side and some in the middle; he put his hand nearly through, and he says the damage was from the outside decidedly, it certainly was not caused by the inherent heating. He proceeded to say that the smell was a very bad one, and certainly one not natural to the feathers, and I think he said from eight to twelve inches in the interior was quite wet; he refused to accept the feathers; he said that the smell of heat in feathers would be quite different; he said in cross-examination that he put his hand in and that they were of an oily or greasy appearance.

The next witness of importance is, I think, the lighterman who fetched the bales from the *Peter der Grosse,* and he, when he received these goods, called attention to their condition, because, he said, they looked as if they had been in mud, and when he gave his receipt for them it was in these words: "Received the within in good condition into barge *Result,* No. 1765, to be landed at the Custom House. Bales dirty." There he delivered them to Mr. Mackenzie at the Custom House quay, who was manager to Mr. Dudley Smith. Mr. Mackenzie said the goods were landed about the 27th of July; that the outside of the bales was dirty and damp—they looked as if they had been drawn across the deck, the cause of their condition was recent—and they were not externally in a merchantable condition; he did not examine the inside.

It is clear, therefore, that these goods were taken out in an unmerchantable condition, and that they were damaged externally as well as internally; that the damage was recent; that the damage was not one which would be naturally inherent in any goods, or in the feathers and down themselves; and that the feathers and down themselves were of the very best quality. Now, these points being established, it becomes important to consider what evidence is furnished by the bill of lading as to their condition when they were

1875

THE PETER DER GROSSE.

put on board; and I agree with the observation which has been made by Mr. Clarkson, that, fairly construed, and giving all due weight to the legal effect of the marginal note, the result must be that apparently, and so far as met the eye, and externally, they were placed in good order on board this ship. Well, then, if that be so, if the plaintiffs have shewn by primâ facie evidence that, having put these bales and bags in good order on board the ship, they were taken out in bad order both externally and internally, I agree with the observation which was made that it is not incumbent on them to shew either how or when the damage was done. It is for the defendants to displace the evidence, which certainly shews that it did not occur from any internal mischief inherent in the feathers or the down, and was not one which had any external appearance when they were put on board the ship.

It has been asserted that the shipowners have proved the impossibility of the mischief having happened on board the ship. But it does not appear to me that the evidence goes to that length. There were spirits of a strong smell on board this ship. There were passengers who, for a short time, were living in the vicinity of this cargo, in and amidst the cargo. The vessel was seventeen days at Revel, and the cargo was discharged, I think, according to the evidence, all about the same time; and there was a leaking cask or casks among the cargo; but, giving due weight to these circumstances, I do not think that they furnish adequate reasons for the damage which unquestionably happened to these goods, or that by such suggestion the defendants have displaced the proof adduced by the plaintiffs by shewing that when these goods were put on board the vessel they were in a bad condition internally, and that this bad condition appeared at the time in the external state of the packages in which they were placed.

Upon the whole, I think that the sound conclusion from the facts proved before me is that the plaintiffs have established their case.

I therefore pronounce for the petitioners, and I must order all documents and vouchers to be referred to the registrar to report the amount of the damage done.

Solicitors for plaintiffs: *Stibbard & Cronshey.*
Solicitors for defendants: *Plews & Irvine.*

BAIGENT *v.* BAIGENT.

1875
Nov. 16.

Refusal to produce a Will—Attachment—Order XLIV., *s.* 2—*Practice.*

A person served with a subpœna under 20 & 21 Vict. c. 77, s. 26, to bring in a testamentary paper, failed to comply with it. On a motion for an attachment against him, it was held that, in accordance with Order XLIV., s. 2 (Judicature Acts, 1873, 1875), the party proceeded against must receive notice of the application in the first instance.

THOMAS BAIGENT, late of Windlesham, Surrey, executed a will, bearing date the 29th of September, 1871, and thereof appointed Benjamin Baigent executor. On the death of deceased, one of his sons, Thomas Baigent, took possession of his will, and refused to give it up. A subpœna issued from the probate registry, which was personally served upon Thomas Baigent on the 15th of October last, requiring him to bring into the principal registry, within eight days, such testamentary paper; but he did not comply with it. On an affidavit of service, and of the non-production of the will, and non-appearance,

Searle moved for an attachment to issue against him. As it was a matter depending before the transfer of causes, matters, and proceedings from the Court of Probate to the High Court of Justice, he presumed a rule nisi would issue, in the first instance, under the old practice.

SIR J. HANNEN (President). I did not intend that applications of this kind should be affected by the rule I made as to transferred causes. By Order XLIV., s. 2 (Judicature Act), no writ of attachment shall be issued without the leave of the Court, to be applied for on notice to the party against whom the attachment is to be issued. The notice to the defendant is substituted for the rule nisi, and such notice must be given before I grant this application.

Solicitors: *Paine, Hammond, & Richards.*

1876
Jan. 11.

In the Goods of MARY CARTWRIGHT.

Administration Bond—Assignment—Rule Nisi—Judicature Act, 1873, *Order LIII., Rules* 2, 3—*Practice.*

An application made to assign an administration bond in order to its being sued upon, is not one made in an action, and consequently Order LIII., Rules 2, 3, is not applicable to it, and the old practice will still prevail that there shall be a rule nisi in the first instance, calling upon the sureties to shew cause why the bond should not be assigned.

Bayford moved the Court for a rule nisi calling upon the sureties to an administration bond granted in the goods of the deceased Mary Cartwright, to shew cause why the Court should not order one of the registrars to assign the bond to a certain person for the purpose of its being sued upon.

Sir J. Hannen (President). Have you considered the effect of Order LIII., Rules 2, 3; and ought not the sureties to have received notice of this motion?

Bayford. The 2nd Rule (Order LIII.) is to the effect that no rule or order to shew cause shall be granted in any action except in the cases in which an application for such rule or order is expressly authorized by the rules; and the 3rd, that except where by the practice existing at the time of the passing of the Act, any order or rule has heretofore been made ex parte absolute in the first instance, and except where by the rules it is otherwise provided, and except where the motion is for a rule to shew cause only, no motion shall be made without previous notice to the parties affected thereby. In this case there is no action pending, although an action may arise if the motion be granted; and even if there were an action, the application is within the exception, as it is for a rule to shew cause only.

Sir J. Hannen (President). I am of opinion that this is not a proceeding in an action, and therefore it does not come within Order LIII., Rules 2, 3, and consequently the old practice will prevail.

Solicitors: *Torr, Janeway, & Co.*

IN THE MATTER OF THE PETITION OF SHEEHY.

1876
Jan. 25.

Restitution of Conjugal Rights—Written Demand for Cohabitation—Respondent keeping out of the Way—Rule 175.

If the Court is satisfied that the residence of an intended respondent is wilfully kept from the knowledge of the petitioner, it will order substituted service of the demand for cohabitation required by Rule 175 (Additional Rules and Regulations, 30th January, 1869), as well as of the petition and citation.

ANASTASIA MARGARET SHEEHY was married to James Aloysius Maynard Sheehy on the 22nd of November, 1874. The parties cohabited together at several places until June, 1875; but there is no issue of the marriage. On the 21st of June, 1875, Mr. Sheehy withdrew from cohabitation, and has since kept away from his wife without any just cause whatever. Mrs. Sheehy was desirous of instituting a suit for restitution of conjugal rights, but before she could do so, it was necessary under Rule 175 (Additional Rules and Regulations, 1869) that she should make a written demand for cohabitation and restitution of conjugal rights upon her husband. It appeared from the affidavit of Mrs. Sheehy, that her husband on leaving her on the 21st of June, 1875, went to the house of his father, Michael Sheehy, 55, Gold Hawk Road, Shepherd's Bush. That she called there the following day, and was told that he had left that morning, and that it was not known where he had gone to. That she made repeated visits afterwards to the same house, when the father refused to give her any information about her husband, and on one occasion, he said, "I know where he is, but I shall never tell you." That she had made inquiries elsewhere, and especially of a Mrs. Fleming, at Highgate, who was a friend of her husband. That she refused to give information, but told Mrs. Sheehy that she might make her mind easy, as she would never see her husband again. Under these circumstances,

C. A. Middleton applied to the Court to allow substituted service of the written demand required by Rule 175, to be made on the father, Michael Sheehy; and in case the demand should not be complied with within a reasonable time, to allow substi-

1876

Ex parte Sheehy.

tuted service of the citation and petition in a suit for restitution of conjugal rights to be effected in a similar manner.

The Judge Ordinary (President). Let the demand for cohabitation and restitution be served on the husband's father and advertised; and if no attention be paid to that, a petition may be filed. And after such demand has been made and petition filed, if no further information can be obtained as to the whereabouts of the husband, upon affidavit to that effect being filed, I allow substituted service of the petition and citation to be effected in the same way as the service of the demand.

Solicitor: *F. R. Coote.*

Feb. 1.

In the Goods of SCHWERDTFEGER.

Administration ad colligenda bona—Power to dispose of Property by Sale.

Where it is for the benefit of the absent or unknown next of kin the Court will direct an administrator ad colligenda bona to dispose of the property or of any portion of it by sale.

Ferdinand Schwerdtfeger, of Hayman's Green, West Derby, Lancashire, died on the 29th of December, 1875, a bachelor, and intestate, and without any known relation. He was a native of Prussia, but had resided in this country for seventeen years, carrying on the business of a schoolmaster. He died possessed of 90*l.* in cash, of furniture worth 250*l.*, debts due from parents of pupils, 460*l.*, and of the goodwill of his school, for which an offer had been made by Messrs. Bradrebusch and Coff, of West Derby, provided they could obtain possession forthwith. At the time of his death the deceased was indebted to the applicant, John William Wilson, to the amount of 322*l.*, a balance of moneys lent and advanced to him. Mr. Wilson is about to apply for administration of the goods of the deceased as a creditor, but as a considerable time must elapse before, in due course, such an application could be made,

Dr. Swabey applied for an administration ad colligenda bona to be granted to Mr. Wilson. It was essentially necessary that some one should have authority to receive the debts due from the

parents of the pupils, and power should be granted to such administrator to accept the offer made to take over the establishment forthwith, otherwise the estate of the deceased will be greatly depreciated by reason of the heavy expenses which will be incurred in carrying it on, including rates, taxes, and servants' wages. The representative of the Crown in Lancashire did not object to the application. [He referred to *In the Goods of Clarkington* (1); *In the Goods of Stewart.* (2)]

SIR J. HANNEN (President.) Although there may be no precedent for giving such a power to an administrator ad colligenda bona, I think this is a case in which I should make one. The business, that of a schoolmaster, is of such a nature that if it be not disposed of at once it may be seriously depreciated in value. As the effect of allowing the matter to stand over will be to destroy the value of the property, it will be for the benefit of all parties that the proposed direction to the administrator should be given. He will also receive the debts due to the estate and make the necessary payments.

The order made thereupon was as follows:—It is ordered that letters of administration of the personal estate and effects of Ferdinand Schwerdtfeger, deceased, be granted to the said John William Wilson, limited to the collection of all the personal property of the said deceased, and giving discharges for all debts which might be owing to his estate on payment of the same, and disposing of the goodwill of his business or occupation of a schoolmaster, and doing further what may be necessary for the protection of the property aforesaid, and to the safe keeping of the same, to abide the direction of the Court; he, the said J. W. Wilson, exhibiting a declaration instead of an inventory of the said personal estate, and his sureties justifying. And it is further ordered that the said J. W. Wilson do pay into the registry of the Probate Division of this Court the balance that may remain in his hands after payment of the expenses of the sale aforesaid, and the costs of obtaining the said letters of administration, such costs being first taxed.

Solicitors: *Layton & Jaques.*

(1) 2 Sw. & Tr. 380. (2) Law Rep. 1 P. & M. 727.

1876
Feb. 9.

BEDDINGTON AND OTHERS *v.* BEDDINGTON AND OTHERS.

Testamentary Suit—Defendant out of the Jurisdiction and a Foreigner—Notice of Writ of Summons.

Where one of the defendants is a foreigner resident abroad the proper course is to take out a concurrent writ of summons, and to serve a notice of it upon such defendant.

HENRY MOSES, late of Park Square West, Regent's Park, Middlesex, died on the 3rd of December, 1875. The plaintiffs propounded a will of the deceased bearing date the 21st of March, 1873, with six codicils thereto. The defendants were the next of kin of the deceased, and the persons entitled in distribution to his personal effects in case he had died intestate. Amongst them were Lewis Nicholas Adolphe Mégret, who was described as resident out of the jurisdiction of the Court at Rue Michel Ange Auteuil, near Paris, and Rachel Adelaide Mégret, his wife, one of the natural and lawful children, and one of the next of kin of the deceased. She is living separated from her husband at Park Square West, Regent's Park.

Inderwick, Q.C. (*Dr. Tristram* with him), moved the Court for an order under Order XI., Rule 2, for permission to serve the defendant Lewis Nicholas Adolphe Mégret with a copy of the writ of summons in the action, together with a copy of the order to be made on this motion, out of the jurisdiction in France.

SIR J. HANNEN (President). Have you considered the question whether you ought not to serve upon him a notice of the writ rather than the writ itself? By the rule it would seem to be the intention to continue the practice introduced by the Common Law Procedure Act, 1852, s. 18, for it is in the alternative, "service of a writ of summons or notice of a writ may, by leave of the Court or judge, be allowed out of the jurisdiction." Service of process upon a foreigner not a subject of Her Majesty in another country may involve unpleasant questions of jurisdiction, whereas if it were not formally served upon, but only notice of the proceedings given to, such foreigner, no such consequences can arise.

Feb. 9. *Inderwick, Q.C.*, said he had considered the Orders II., Rules 4 and 5, and XI., Rules 2 and 3, and the forms in the Appendix, Nos. 2 and 3, and also the Common Law Procedure Act, 1852 (16 & 17 Vict. c. 76), ss. 18, 19, and he thought it was clear that the service of a writ upon a foreigner out of the jurisdiction should be by a notice of such writ. It would, however, be necessary that a concurrent writ should issue in order that notice thereof should be given to the defendant Mégret.

SIR J. HANNEN (President). I quite agree with your view of the case. You may issue a concurrent writ for service out of the jurisdiction, returnable in eight days after service, as you have already issued one for service within, and you may then give notice of such writ to the defendant Mégret now resident in France.

Solicitors: *Emmanuel & Simmonds.*

IN THE GOODS OF BURDETT.

March 21.

Administration de bonis non — Administration to Creditor — Assignment by Trustee of Bankrupt—Administration of Debt due from Intestate's Estate—Limited Grant de bonis non to such Assignee—24 & 25 *Vict. c.* 134, *s.* 137 —32 & 33 *Vict. c.* 71, *s.* 111.

A creditor having obtained administration of the estate of an intestate, died without having fully administered, and leaving the debt due to him still unsatisfied. The creditor was a bankrupt at the time of his death, and after his death his trustee in bankruptcy assigned the unsatisfied debt due to his estate from the intestate's estate to one of his creditors. The Court made a grant of administration de bonis non to such assignee, limited to the interest in the intestate's estate which had been assigned to him.

GEORGE BURDETT, of the city of Oxford, coal merchant, died on the 11th of February, 1865, intestate, leaving a widow and three children surviving him. His widow, on her own behalf, and as guardian of two of the children, who were minors, renounced administration. A third child, George William Burdett, was cited by Henry Cowley, a creditor, but did not appear, and on his non-appearance administration was granted to Cowley.

1876

IN THE GOODS OF BURDETT.

On the 25th of June, 1873, Cowley died intestate, leaving part of the estate unadministered. No administration had been taken out to the estate of Cowley. In March, 1871, Cowley had been adjudicated a bankrupt, and Henry Stone Booth was duly appointed trustee in bankruptcy. By indenture, dated the 1st of December, 1874, Booth, as such trustee, in consideration of the sum of 10*l.*, assigned to Wootton & Co., bankers of Oxford, and creditors of Cowley's estate, the debts still remaining due and unsatisfied from the estate of George Burdett to the estate of Cowley.

At the date of Cowley's death, George Burdett's widow and two children, who had renounced, were still living, and had not retracted that renunciation. The son, G. W. Burdett, had died a widower and intestate, leaving an only child a minor, and in June, 1875, administration of his estate was granted to John Smith Burgiss as the guardian of the minors. Burgiss had duly renounced administration of the unadministered estate of George Burdett.

Bayford moved for a grant of administration of the unadministered estate and effects of George Burdett to W. W. Wootton, one of the partners of Wootton & Co., limited to the interest of Cowley in the said estate, which had been assigned to Wootton & Co. by Booth. He cited *In the Goods of Coles* (1); the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 137; the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 111.

THE COURT made the grant limited as prayed.

Solicitors: *Twisden, Parker & Co.*

(1) 3 Sw. & Tr. 181.

IN THE GOODS OF BANGHAM.

1876
May 16.

Will—Revoked by Marriage—Subsequent Will—Conditional Revival of first—Incorporation.

The deceased, having duly executed his will, married, and subsequently executed another will in favour of his wife and children. In this last will, in case there were no child or children of the marriage living at the death of his wife, he revived and brought into force again his former will, and directed that its provisions and directions should be complied with as though they formed part of his last will. At the time of his death there were living a widow and one child :—

Held, that the first will should be included in the probate.

THE Rev. Thomas Alfred Bangham, of St. Michael, Lichfield, clerk, died on the 22nd of February, 1876. On the 21st of May, 1863, he executed a will, in which he appointed the Rev. William Nathaniel Griffin and William Odell executors. By this will he gave several bequests to charitable institutions, 2500*l.* for the benefit of his paternal, and 2500*l.* for the benefit of his maternal, relatives, and the residue to William Nathaniel Griffin. He subsequently married, and on the 13th of January, 1875, he executed another will, in which he named as executors the same persons as in the first will. By this second will, with the exception of a few legacies, the property was left to the executors in trust for the benefit of his wife and children. It contained the following clause: "But if my wife at her death have no children, both hers and mine, surviving her, and if also my said wife leave no grandchildren, both hers and mine, surviving her, then, but not otherwise, I hereby revive and bring into force again my former will made before my marriage, and dated the 21st day of May, 1863, and witnessed by Alfred S. Trevor, of Bridgnorth, and by Dodo Davis Jones, of Bridgnorth, and direct that all its provisions and directions shall be complied with, as though it formed part of this my last will and testament, except that, whatsoever sum any person or persons, or societies, shall have received under the provisions and directions of this will, he and she and they shall receive that same amount less under my revived will than if they had not already received it under this my last will; but there shall not be any

1876

IN THE GOODS OF BANGHAM

consideration of or deduction made for interest on the sum already received. If in any particular the directions of my revived will, dated as beforesaid, the 21st day of May, 1863, be inconsistent with the directions of this my last will, my will is that the directions of this my last will shall overrule those of my revived will, neither shall the directions of my said revived will have any force until the directions of this my last will shall have been fully complied with." The deceased left a widow, Frances Helena Mary Bangham, and a daughter and only child, Helena Jane Palk Bangham, surviving him.

Searle moved for probate of both wills—the first as incorporated in the last. The words of reference are distinct, and in the events referred to probate of the former will must be granted. As a matter of convenience it is proper it should be included in the probate at the present time. A difficulty arose in the registry on the ground that, as a widow and child are living, the former will may never come into operation. [He referred to *In the Goods of Cooper*. (1)]

SIR J. HANNEN (President). I am of opinion that it will be convenient that these two wills should be included in the probate. The question is, whether I shall treat the first will as incorporated in the last, or whether, on the events referred to in the last will occurring, upon which the operation of the earlier document is made to depend, the parties should then apply to have it included in the probate. It has been properly stated that the testator merely referred to the former document for his own convenience, and to save trouble. If he had set out in his last will all the provisions of the first one, of course they would have been incorporated in the probate; but to save trouble, instead of writing out all the clauses, he says, in certain events, "I hereby revive and bring into force again my former will made before my marriage." If the earlier will be not incorporated, it must be preserved in the registry, in order to enable the parties to see what is to be done with the property in certain events; but it seems to me that it will save expense and trouble if the first will

(1) Deane, Eccl. 9.

be at once incorporated. Although, from a legal point of view, it makes little difference which way the question is decided, the balance of convenience is in favour of the application.

Solicitors: *Hughes, Hooker, Buttanshaw, & Murton.*

JAMES AND OTHERS *v.* SHRIMPTON AND OTHERS.

May 23.

Will—Revocation by Marriage—Revival by a duly executed Codicil—Destruction of Codicil—Probate.

The testator having duly executed a will, subsequently married. On the day of and after the marriage ceremony he executed a codicil, by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his will. His wife pre-deceased him, and on his death the codicil, which had been in his possession, could not be found. Declarations of the testator of a desire to adhere to his will were proved extending up to the latest period of his life:—

Held, that the testator could not have intended by the destruction of the codicil to render his will inoperative, and that the Court would therefore grant probate of the will and of the codicil as contained in a draft from which the original was prepared for execution.

JOHN JAMES, of Leamington Priors, Warwickshire, needle and fish-hook manufacturer, died on the 25th of June, 1875, having duly executed a will bearing date the 12th day of October, 1871. At that time the deceased was a widower, and the bequests in his will were almost entirely in favour of his children and grandchildren. On the 3rd of July, 1872, he was married at Llandudno, North Wales, to Miss Emily Dickinson, and on the same day, and subsequently to the marriage ceremony, he duly executed a codicil to his will, by which he left to her certain articles of furniture, plate, &c., and wine and consumable articles in his dwelling-house at his death, and also the interest of 3000*l.* for her life; and he further revived, ratified, and confirmed in every other respect his said will. On the 28th of December, 1874, Mrs. James died. In May, 1875, the deceased produced to his housekeeper, Miss Bromley, a sealed packet, indorsed "the will of John James, also letters to the family, and instructions for his funeral," and directed her in case of his death to give it to his son Charles, one of the plaintiffs. This was done, but when opened it

1876

JAMES v. SHRIMPTON.

was found to contain the will only and not the codicil, which, although it had been in the possession of the deceased, was not forthcoming, and it was believed that the deceased had destroyed it on the death of his wife, in the belief that it would be inoperative. Declarations of the deceased, shewing that he adhered to his will up to a very late period of his life, were proved. The plaintiffs, as executors, propounded the will of the deceased, dated the 12th of October, 1871, and the codicil of the 3rd of July, 1872, as contained in the draft from which the original was prepared for execution. The defendants interested in an intestacy appeared and gave in a formal defence, but did not oppose the grant issuing as prayed.

May 2. *Dr. Spinks, Q.C.*, and *C. A. Middleton*, appeared for the plaintiffs.

Searle, appeared for the defendants.

May 23. SIR J. HANNEN (President). This case was tried before me and the following facts were proved:—On the 12th of October, 1871, the testator duly executed his will, and on the 3rd of July, 1872, he married, whereby his will was revoked. On the same day, and after his marriage, he executed a codicil, in which he made a provision for his wife; and the codicil contained a clause to this effect: "In all other respects I revive, ratify, and confirm my said will." Afterwards circumstances occurred by reason of which the provisions of the codicil failed, and it is probable that he then destroyed it. The question for my consideration is, whether the destruction of the codicil upon which the revival of the will depended has left the will inoperative. I am of opinion that it was not the intention of the testator to leave the will inoperative, but his idea was, that the will, having been brought into existence again, remained valid notwithstanding the destruction of the codicil. I was asked to grant probate of the will and codicil on the presumption that what the testator had done had not been done animo revocandi. Where there has been a physical destruction of a testamentary paper the Court has often been called upon to form an opinion as to the intention of a deceased at the time he did the act. In this case I have come to the conclusion that the

testator destroyed the codicil with no intention of revoking the will, and that the Court should give no more effect to the act than it would do if the testator had destroyed the paper under a mistake as to the instrument he was destroying. It was done under a misconception of the effect of the act; it was not done animo revocandi, and I therefore decree probate of the will and codicil.

Solicitors for plaintiffs: *Jenner & Dyke.*
Solicitors for defendants: *Deacon, Son, & Rogers.*

IN THE GOODS OF BRADDOCK.

June 27.

Codicil attached to Will—Subscription and Attestation of Witnesses to Codicil on Back of Will.

6 PD 20

The witnesses to the execution of a codicil signed their names on the back of a will, to which that codicil was attached by a pin. There was evidence which satisfied the Court that the will and codicil were pinned together at the time of the execution of the codicil, and that the witnesses intended by their subscription on the back of the will to attest the signature of the testatrix at the foot of the codicil:—

Held, that the codicil was entitled to probate.

MARY ANN BRADDOCK, late of Liverpool, in the county of Lancaster, widow, died on the 9th of February, 1876. She wrote out and duly executed a holograph will, bearing date the 24th of November, 1864. This will, together with the execution and attestation of the witnesses, occupied one side of a sheet of paper.

On the 25th of January, 1876, the testatrix produced this will to two persons named Sarah Jane Williams and Louisa Ann Dakin. When it was so produced, it had attached to it by a pin a smaller piece of paper unsigned, containing, in the testatrix's handwriting, some bequests to her sister and her sister's grandchildren. In the presence of these two witnesses the testatrix then did the following acts. First, she altered a bequest in the original will by striking out the name of a legatee and substituting by interlineation the names of other legatees. Then she traced over her signature at the foot of the original will with a dry pen, and, lastly, she signed her name at the foot or end of the smaller piece

1876

IN THE GOODS OF BRADDOCK.

of paper, which was pinned on to the original will. Sarah Jane Williams thereupon, at the request of the testatrix, wrote on the back of the original will the following words:—"Also signed this day in the presence of each other, January 25th, 1876."

Immediately below these words Sarah Jane Williams and Louisa Dakin signed their names in the presence of the testatrix. There was sufficient room for the above words and for the names of the witnesses below the signature of the testatrix on the smaller piece of paper; but Sarah Jane Williams, in her affidavit, stated that she and her fellow witness, in writing their names where they did, intended to attest both the alteration in the original will and the execution of the smaller piece of paper attached thereto.

June 13. *C. A. Middleton* moved for probate of both papers, together with the alteration in the first. The second paper was duly executed. It is immaterial on what part of the paper the witnesses subscribe their names. Parol evidence of their intention to attest will be acted on, unless the position of their signatures be inconsistent with such evidence. Here the words written by Williams confirm her evidence, for nothing was signed by the testatrix on the 25th of January, 1876, except the second paper: *In the Goods of Davis* (1); *In the Goods of Chamney* (2); *Roberts* v. *Phillips* (3); *In the Goods of Wilson.* (4) In this case the subscription of the witnesses is on a different sheet of paper from the signature of the testatrix, but the two sheets were pinned together. This distinguishes the case from *In the Goods of Pearse.* (5) If the second paper was duly executed, it rendered valid the alteration in the first paper.

Cur. adv. vult.

June 27. SIR J. HANNEN (President). In this case the witnesses, instead of attesting the signature of the testatrix on the paper itself, attested on the back of the original will, to which that paper was attached by a pin. The law does not require that the attestation should be in any particular place, provided that the

(1) 3 Curt. 748.
(2) 1 Roberts. Eccl. 757.
(3) 4 E. & B. 450; 24 L. J. (Q.B.) 171.
(4) Law Rep. 1 P. & M. 269.
(5) Law Rep. 1 P. & M. 382.

1 Jur N S 444.

evidence satisfies the Court that the witnesses in writing their names had the intention of attesting. But the attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet. No particular mode of affixing one piece of paper to another is prescribed by law, and I cannot say that the fastening of two sheets of paper together by a pin is an insufficient mode of connection, or that it is less effectual than the lawyer's mode of fastening by a tape. Here I am satisfied by the evidence that the papers were connected together, and that in writing their names on the back of the original will, the witnesses intended to attest the signature of the testatrix at the foot of the codicil. That codicil, being duly executed, confirms the will in its altered state, and probate will go accordingly.

Solicitor: *Waddilove.*

IN THE GOODS OF GRANT.

July 11.

Will—38 Geo. 3, c. 87, s. 1—21 & 22 Vict. c. 95, s. 18—An Executor's Executor out of the Jurisdiction.

An executor's executor is affected by the provisions of the statutes 38 Geo. 3, c. 87, s. 1, and 21 & 22 Vict. c. 95, s. 18, so that if he reside out of the jurisdiction of the Court of Probate at the expiration of twelve calendar months from the death of his testator, the Court may grant administration with the will annexed of the estate of the original deceased to a creditor, next of kin, or legatee, limited to institute a suit in the Court of Chancery, or to receive a specific fund.

RICHARD GRANT, formerly of Montreal, Canada East, in British North America, died within the territory of Idolio, in the United States of America, on the 21st of June, 1862. He executed a will dated the 3rd of November, 1860, in which he appointed Dugald McTavish, chief factor of the Hudson Bay Company, Roderick Finlayson, and William Gregory Smith, assistant secretary, Hudson Bay Company, London, executors; and his wife, Helen McDonald Grant and his children residuary legatees. The deceased left surviving him a widow and two children, Julia Priscilla Grant, who subsequently married Christopher Higgins, and now resides at Montaria, in the United States of America, and Adeline

1876

IN THE GOODS OF GRANT.

Grant, who married Lachlin McLaurin, and died in the United States in 1871, leaving surviving her her husband and one child, Donald McLaurin. Dugald McTavish alone proved the will of the deceased Richard Grant on the 1st of February, 1864 (the other executors having renounced their right to do so), and he died at Montreal in May, 1871, having executed a will in which he appointed Alexander Grant Dallas, James Bissett, and William McTavish (who died in his lifetime) executors; Alexander Grant Dallas renounced probate of this will, but it was proved by James Bissett, at Montreal, on the 23rd of August, 1871, and subsequently in London. All the estate of the deceased Richard Grant has been distributed except a sum of 8950*l.* 6*s.* 7*d.* deposited on interest with the Hudson Bay Company, who are prepared to pay the same to any person entitled to give a receipt therefor.

James Bisset resides in Canada, out of the jurisdiction of the Court of Probate. He has never intermeddled in the estate of Richard Grant, and although frequently applied to to do so, has refused to take any steps to realize or recover any moneys belonging to such estate. Mrs. Grant died in the United States in 1863, having made a will in which she beqeathed the residue of her estate to her daughters, Julia Priscilla Grant and Adeline Grant, and to a daughter by a former husband, Eloise Jemima Kittson, now the wife of William Sinclair. Mr. and Mrs. Higgins, Mr. McLaurin, as guardian of his son Donald McLaurin, and Mr. and Mrs. Sinclair have appointed Melbourne McTaggart Tait to be their attorney, to apply for and obtain on their behalf administration, with the will annexed, of the goods of the deceased, but limited to the moneys deposited with the Hudson Bay Company in the name of the deceased.

July 4. *Bayford* moved accordingly. By 38 Geo. 3, c. 87, s. 1, and the Probate Acts, the Court has authority to make such a grant to the residuary legatees in the absence of an executor residing out of the jurisdiction, and the same principle seems to be applicable to an executor's executor. [He referred to *In the Goods of Ruddy* (1); see also *In the Goods of Davies.* (2)]

Cur. adv. vult.

(1) Law Rep. 2 P. & M. 330.

(2) 2 Hagg. Eccl. 79.

July 11. SIR J. HANNEN (President). In this case the deceased made his will, in which he nominated three executors, two of whom renounced probate both here and in Canada. The third proved the will, but subsequently died, leaving part of the property unadministered, and having made a will in which he appointed executors, one of whom took probate, the other having renounced. This last executor has refused on application to take any steps to realize or recover moneys belonging to the estate of the deceased Richard Grant, and he is out of the jurisdiction of this Court, as he is resident in Canada. By 38 Geo. 3, c. 87, it was enacted that at the expiration of twelve calendar months from the death of any testator, if the executors or executor, to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of her Majesty's courts of law and equity, it shall be lawful for the ecclesiastical court which hath granted probate of such will, upon application of any creditor next of kin or legatee . . . to grant an administration limited for the purpose that the administrator become and be made a party to a bill or bills to be exhibited in any of her Majesty's courts of equity, and that he may carry out the decree or decrees of such Court, but no further or otherwise, and by the statute 21 & 22 Vict. c. 95, s. 18, the provisions of this Act were extended to all executors and administrators residing out of the jurisdiction of her Majesty's courts of law and equity, whether it be or be not intended to institute proceedings in the Court of Chancery.

The question for my consideration is, whether these provisions apply to the case of an executor's executor, and I have come to the conclusion that they do. An executor's executor is the executor of the original deceased, though he became so, not by appointment, but by devolution of law. I, therefore, authorize the applicant to take a grant of administration limited to receive the particular amount referred to in the affidavit, the moneys deposited with the Hudson Bay Company.

Solicitors: *Wilde, Berger, Moore, & Wilde.*

1876
August 1.

IN THE GOODS OF GALLY.

Will of naturalized British Subject—Will made in England according to English Law—Foreign Domicile at Time of Death—24 & 25 Vict. c. 114, s. 2.

A naturalized British subject, whilst domiciled in England, made a will according to the forms required by the law of England. At the time of his death he was domiciled in Italy. His will was admitted to probate under 24 & 25 Vict. c. 114, s. 2.

DOMINICO GALLY was an Italian by birth, and having become domiciled in England, he obtained letters of naturalization as a British subject, under 7 & 8 Vict. c. 66, from the then Secretary of State for the home department, the Right Hon. S. H. Walpole.

The letters were dated the 25th of November, 1852, and were to this effect: "Now, in pursuance of the power and authority granted to me as Secretary of State, I hereby grant to the aforesaid Dominico Gally all the rights and capacities of a natural-born British subject, except the capacity of being a member of the Privy Council or a member of either House of Parliament, and except any rights and capacities of a natural-born subject out of and beyond the dominions of the British Crown and the limits thereof."

When residing at Leeds D. Gally made a will and codicil, dated respectively the 21st of May, 1871, and the 28th of April, 1873, which were duly executed according to the forms required by the law of England. After April, 1873, he returned to Italy, and was domiciled in Italy at the time of his death, which occurred at Lemma, on the Lake of Como, on the 21st of May, 1876.

Bayford moved for probate of the said will and codicil, and referred to the 2nd section of 24 & 25 Vict. c. 114.

SIR J. HANNEN (President). The concluding exception in the letters of naturalization may, perhaps, have reference to the possibility of the status of a British subject being set up by a naturalized person in opposition to the claims of some foreign state; but I think I am not called upon, for the present purpose, to express any opinion as to the meaning of that exception. The

legislature has conferred on the Crown the power of investing foreigners with the rights of British subjects, and that power having been exercised in favour of the testator, I must deal with his case in precisely the same way as if he had been a British subject by birth, unless there has been any exception affecting his testamentary powers as a British subject. I do not see that any such exception has been made; but here, the will and codicil having been duly executed according to the law of England at a time when he was domiciled in England, and was also a British subject, they are within the terms of 24 & 25 Vict. c. 114, s. 2, and are entitled to probate.

Solicitors: *Shum & Crossman.*

IN THE GOODS OF FARRANDS.

August 1.

*Administration—Creditor preferred to Next of Kin—*20 & 21 *Vict. c.* 77, *s.* 73.

Where the deceased, a paper manufacturer, was alleged to be insolvent at the time of his death, and his next of kin was a woman in a low position of life, and quite unfitted to carry on or wind up the business, the Court, under the provisions of 20 & 21 Vict. c. 77, s. 73, granted administration to a principal creditor, who applied for the same with the sanction of other creditors.

THOMAS FARRANDS of Ilford, Essex, paper manufacturer, died on the 28th day of June 1876, intestate, and leaving surviving him Eliza Spencer of Nottingham, widow, his sister, and only next of kin. Joseph Barling of Maidstone, Kent, paper pulp manufacturer, claimed to be a creditor of the deceased for goods sold to him between the 1st of January and the 31st of May, 1876, to the amount of 939*l.* 5*s.* 1*d.*, and on the ground that the deceased was in insolvent circumstances at the time of his death, he applied under the provisions of 20 & 21 Vict. c. 77, s. 73, for letters of administration to be granted to him in preference to the next of kin. His application was supported by a resolution passed at a meeting, held on the 7th of July, 1876, of the principal creditors of the deceased. It appeared from the affidavits that the debts of the deceased amounted to 5000*l.*, and his property was valued

1876

IN THE GOODS OF FARRANDS.

at 3630*l.*, but these sums were not admitted by the next of kin, and it was maintained that the estate, if properly wound up, would be found to be solvent. It also appeared that Mrs. Spencer is a person in very low condition of life, that she had on several occasions slept in the casual ward of the workhouse, and had even applied to be admitted permanently therein, and was a woman of drunken and dissipated habits. This last charge Mrs. Spencer swore to be untrue. Mrs. Spencer filed an affidavit from Mr. Henry Young of Nottingham, public accountant, in which, after stating his belief that the estate of the deceased is solvent, he undertook to find two or three responsible persons as sureties to double the value of the estate, providing the Court should grant the administration to Mrs. Spencer.

Dr. Tristram applied that the administration should be granted to Mr. Barling. Even if the Court is not satisfied that the estate is insolvent, there are special circumstances, namely, the position in life and conduct of the next of kin, which would induce the Court to give the preference to a creditor who is not only a principal creditor himself, but represents many others.

R. A. Pritchard, for the next of kin. It is unprecedented to prefer a creditor to the next of kin when the insolvency of the estate is disputed: *Hawke* v. *Wedderburn.* (1) All that has been proved against the next of kin is that she is in reduced circumstances; but she is prepared to give ample security for the due administration of the estate, and that is all the creditors can require.

SIR JAMES HANNEN (President). There is a large discretion given to the Court by the 73rd section of the Probate Act. It authorizes the Court, where a person has died intestate as to his personal estate, and it shall appear to the Court to be necessary or convenient in such a case, by reason of the insolvency of the estate of the deceased or other special circumstance, to appoint some person to be administrator of the personal estate of the deceased other than the person who, if the Act had not been passed, would by law

(1) Law Rep. 1 P. & M. 594.

have been entitled to a grant of administration, at its discretion to make such a grant. Now the question arises, what should be the character of the special circumstance which may guide the Court in exercising its discretion? It would seem that insolvency of the estate is only given as an example, and I cannot conceive any reason for setting aside a next of kin on the ground of the insolvency of the estate, which would not be peculiarly applicable where the person entitled to the grant appears to be entirely unfitted for the office. Indeed, it would be a much more reasonable ground for setting aside the rights of that person than the mere fact that the estate is insolvent. What are the special circumstances in this case? The question is, whether I, having the power to grant administration to a creditor whose debt amounts to over 900*l.* and who is the representative of other creditors, shall confide it to him or to the next of kin, a woman unacquainted with business, and who still more, from her habits of life, is entirely unsuited for the position; for it is proved that she is in a low condition of life, of dissipated habits, and has on several occasions been an inmate of the casual ward of the workhouse. I should do wrong if, merely on account of this woman being next of kin, I were to make the grant to her rather than to the creditor. If the grant be made to Mr. Barling under the 73rd section, I am more likely to bring about a proper administration of the estate, and I shall therefore make the grant to the applicant, but he must give justifying security.

Solicitors for applicant: *Surridge, Hunt, & Williams.*
Solicitor for next of kin: *Belk.*

1876
May 23.

GLADSTONE *v.* GLADSTONE.

Order to vary Settlements after Dissolution of Marriage—Property brought into Settlement by Wife—Omission of dum sola et casta vixerit Clause—Power of Court to review and alter Order for variation of Settlements—22 & 23 Vict. c. 61, s. 5.

Where a marriage has been dissolved on a wife's petition, and the settlements are varied by extinguishing the husband's interest in property brought into settlement by the wife, the Court will not impose the condition that she shall enjoy such property only dum sola et casta vixerit.

The Court has power to review and alter an order for the variation of marriage settlements, but it will not do so by reason of circumstances which have occurred since the making of the order.

On the 6th of August, 1875, a decree absolute was pronounced for the dissolution of the marriage in this case by reason of the adultery and cruelty of the husband, and on the 7th of August, 1875, the petitioner, Mrs. Gladstone, presented a petition under the 5th section of 22 & 23 Vict. c. 61, for a variation of the marriage settlements. By a settlement which was executed on the marriage between the petitioner and the respondent in November, 1862, the property brought into settlement by both parties was assigned to trustees upon trust to pay the interest and dividends thereof to the respondent and his assigns for life, and on his death to the petitioner for her life, with remainder to the children of the marriage. The property brought into settlement by the petitioner consisted of one moiety of the sum of 1125*l*, Bank Stock, 990*l*. Royal Exchange Assurance Stock, 2090*l*. New Three per Cent. Annuities, 8524*l*. 6*s*. 2*d*. New Three per Cent. Consols; also the sum of 6000*l*. to which the petitioner was entitled on the death of her parents, and which was secured by the bond of her father Mr. William Taylor. The settlement further contained a covenant by Mr. W. Taylor that he, his executors or administrators, would during the lives of himself and his wife, and the life of the survivor, pay to the trustees of the settlement the annual sum of 200*l*. to be applied by them upon the same trusts as the interest and dividends of the property brought into settlement by the petitioner. The property brought into settlement by the respondent consisted of the several sums of 1920*l*. Stock of the

Bombay and Baroda and Central India Railway Company, and 1920*l.* Stock of the Punjaub of Scinde Railway Company. It was alleged in the petition that the respondent was in receipt of an income of 600*l.* per annum besides the income of the settled property. The petition was referred in the usual course to one of the registrars, who, after an inquiry into the allegations contained in it, at which the respondent's solicitor attended, made a report, which was afterwards confirmed by the Court. The order of the Court made on the 11th of January, 1876, was as follows:—"It is ordered that the said report be confirmed, and that James Napoleon Gladstone and Richard Dubane the trustees of a certain indenture of settlement bearing date the 3rd day of November, 1862, and made or expressed to be made between Edward Gladstone of the first part, Anne Henrietta Taylor, spinster, of the second part, William Taylor of the third part, and the said James Napoleon Gladstone and Richard Dubane of the fourth part (being the settlement made in contemplation of the marriage of the petitioner and respondent in this cause, and which was duly had and solemnized), do from and after the date hereof stand possessed of the sum of 200*l.* per annum covenanted to be paid by the said William Taylor to the said trustees upon the trusts therein mentioned, upon the trusts that would be applicable concerning the same if the said respondent were dead leaving the petitioner him surviving. And that the said trustees do from and after the date hereof stand possessed of the dividends and interest of the sum of 1920*l.* Stock of the Bombay and Baroda and Central India Railway and 1920*l.* Stock Punjaub of Scinde Railway, part of the funds comprised in the said settlement, upon trust to pay to the said petitioner Anne Henrietta Gladstone the sum of 100*l.* per annum, to be applied by her to the maintenance and education of Catherine Henrietta Margaret Gladstone, spinster, the only child of the said marriage, until the said Catherine Henrietta Margaret Gladstone shall attain the age of twenty-one years, and that when the said Catherine Henrietta Margaret Gladstone shall attain the age of twenty-one years the said trustees shall pay the said sum of 100*l.* per annum to her for her own use and benefit. And it is further ordered that the said trustees shall stand and be possessed of the dividends and interest of one moiety of the sums of 1125*l.* Bank Stock, 990*l.* Royal Exchange Assurance Stock, 2090*l.* New Three

1876

GLADSTONE v. GLADSTONE.

per Cent. Bank Annuities, and 8524*l.* 6*s.* 2*d.* Three per Cent. Consols, and the sum of 6000*l.* secured by the bond of the said William Taylor and more particularly described in the said indenture, when and so soon as the same shall respectively become payable to the said trustees, upon such trusts as would be applicable concerning the same if the said respondent were then dead leaving the petitioner him surviving."

May 9. *Bayford*, for the respondent, moved that the petition might be referred back to the registrar to inquire into certain facts which, it was alleged, were not brought to the notice of the Court at the time when the order was made, and also into certain other facts which had occurred since the date of the order.

Inderwick, Q.C. (*Searle* with him), for the petitioner. The order as to settlements is final, and cannot now be altered.

Cur. adv. vult.

May 16. SIR J. HANNEN (President). In this case I took time to consider the question whether, after the Court has once made an order as to settlements, it has power to vary such order. I have come to the conclusion that I ought not to lay down a hard and fast rule that the Court will not, under any circumstances, review such an order; but I hold that it cannot do so by reason of any matter arising subsequently to the date of the order. Mr. Bayford must, therefore, confine himself to matters which, if brought to the notice of the Court before the order was made might have induced it to make a different order, and I shall not allow him to go into anything that has occurred since the order was made.

May 23. *Bayford* read an affidavit of the respondent, alleging that his income was considerably less than 600*l.* per annum, and submitted that the order gave the petitioner too large a proportion of the settled property. The order ought to have contained a clause that the income of the settled property should be received by the petitioner dum sola et casta vixerit, and it should be amended by inserting that clause: *Fisher* v. *Fisher* (1); *Chetwynd* v. *Chetwynd.* (2)

Inderwick, Q.C. (*Searle* with him), for the petitioner. The

(1) 2 Sw. & Tr. 410.

(2) Law Rep. 1 P. & M. 39. 12 Jur NS. 458

respondent had ample opportunity of bringing before the registrar any facts which he considered material, but he deliberately refused or neglected to avail himself of that opportunity. With regard to the dum sola et casta clause, it has not been usual to insert it in orders for the variation of settlements, but only in orders for the payment of permanent maintenance to a wife out of the husband's property. The order having been made without the clause, it cannot now be inserted: *Narracott* v. *Narracott and Hesketh.* (1)

SIR J. HANNEN (President). I am of opinion that this application must be rejected. In the first place, it is too late. Captain Gladstone had the opportunity of presenting to the Court at the proper time all the arguments and all the facts which he now seeks to lay before me. He had the opportunity of attending before the registrar, and I entertain no doubt that he purposely abstained from doing so. He was, however, represented by his solicitor, and if he has suffered in any way by not attending himself it is his own fault. Further, he had the opportunity of urging the arguments that Mr. Bayford has now urged after the report was made by the registrar and when the Court was moved to confirm it, and if he was not fully informed of the terms of the report, that again was his own fault. But it is scarcely possible for me to credit the statement that he did not know the terms of the report. I am sorry to say that I cannot regard that as a serious excuse. I have not the slightest doubt that Captain Gladstone had the fullest opportunity of instructing his counsel when the report came before the Court for confirmation; and I am therefore of opinion that upon that ground alone the application ought to be dismissed. But I think it right to add a few observations upon the cases to which Mr. Bayford has called my attention with regard to the omission from the order of the words dum sola et casta vixerit. It is to be observed that in both those cases, *Fisher* v. *Fisher* (1) and *Chetwynd* v. *Chetwynd* (2), the husband was called upon to make an allowance out of his own private means to his wife, and it is obvious that very different considerations are applicable to such a state of things and to the case of a husband who

(1) 4 Sw. & Tr. 76; 34 L. J. (P. M. & A.) 54. (2) 2 Sw. & Tr. 410.
(3) Law Rep. 1 P. & M. 39.

1876

GLADSTONE v. GLADSTONE.

is not called upon to make any provision for the wife out of his own means, but who is only deprived of his interest in the wife's fortune. I think it is perfectly reasonable in those cases where the husband is called upon to sacrifice a portion of his own means that the conditions dum sola et casta vixerit should be imposed, but I am of opinion that where the effect of the order is only to deprive the husband of his interest in the wife's fortune, and to put the innocent wife into immediate possession of her own income, no such condition ought to be imposed. Therefore, if I had been asked to do it before the order was drawn up, I should not have imposed those conditions upon Mrs. Gladstone, seeing that the only effect of the order is that she shall be at once put into possession of the income of her own fortune, and that she shall enjoy it during her life to the exclusion of Captain Gladstone. Further than that, the case of *Narracott* v. *Narracott and Hesketh* (1) is an authority for holding that, even if my view had been different from what it is, I ought not to alter the order by introducing those conditions into it after it has been made, unless some extraordinary circumstances can be shewn to exist which did not exist in that case, and which, in my judgment, do not exist in this case. With regard to the question of amount, I have already said that Captain Gladstone had the opportunity of presenting himself before the registrar when the matter was being inquired into, and that he might also have come before me, if he had thought fit, before the order was drawn up. He has neglected those opportunities, and is excluded from re-opening the matter upon that ground. But upon this part of the case also, whatever may be Captain Gladstone's income, I may go so far as to say that, even if it were absolutely nil, I should not think it right to leave him in possession of any portion of his wife's separate estate. I should leave him to earn his living, as no doubt he can do, in his own profession or otherwise, and I should leave the wife in the enjoyment of her part of the settled property. Even assuming that the figures could be altered, it would make no difference in the judgment I pronounce. I therefore dismiss this application, with costs.

Solicitors for petitioner: *Lewis & Whitsed.*

Solicitors for respondent: *Park Nelson, & Morgan.*

(1) 4 Sw. & Tr. 376.

BENYON *v.* BENYON AND O'CALLAGHAN.

1876
July 11.

Dissolution of Marriage—Alteration of Settlements—Covenant to appoint in favour of Respondent—Allowance to Petitioner under a Separation Deed—Delay.

After a final decree in a suit for dissolution of marriage, the Court has authority under 22 & 23 Vict. c. 61, s. 5, to relieve an innocent party from a covenant to appoint in favour of the other party who has been guilty of a matrimonial offence.

Where a petitioner has accepted an allowance from the respondent under a deed of separation, and subsequently has sufficient grounds to claim a dissolution of his marriage, he is not precluded from applying for an increased provision out of the income of the respondent.

6 PD 99
7 PD 81
— 80
8 PD 160

THE petitioner, Augustus William Benyon, was married to Mrs. Rosina Follet, widow, on the 9th of April, 1870, and one child, a son, was born of the marriage on the 1st of March, 1871. On the 31st of July, 1874, a decree absolute was made for the dissolution of such marriage, and in November, 1874, the respondent was married to the Honourable George Cornelius O'Callaghan, the co-respondent. By an indenture of settlement dated the 9th of April, 1870, all the share to which the respondent was entitled in the personal estate of Edward Charles Follet, her former husband, was vested in trustees upon trust to invest the same in certain securities therein mentioned, and to pay the annual income arising therefrom to the respondent for life for her separate use, and after her death to pay such income to the petitioner for life, and after the death of the survivor of them to hold the said trust premises in trust for an only child of their marriage, if there were not more than one. And if such only child were a son, to pay the principal to him on his attaining the age of twenty-one years. By the same indenture the petitioner covenanted with the trustees, their executors, administrators, and assigns, that he would, as soon as it could be done after the intended marriage, appoint to or in favour of the respondent during her life, if she should survive him, all the annual income which he should have power to appoint in favour of any wife who might survive him, of certain trust funds whereof a settlement was then about to be made under the direction of the Court of Chancery, pursuant to a certain agreement for a compromise dated the 20th day of July, 1869, entered into

1876

BENYON v. BENYON.

in a certain suit of *Vivian* v. *Benyon* and confirmed in that suit by an order of the Court of Chancery made on the 24th of July, 1869. By the settlement so made under the agreement of compromise, dated the 29th of June, 1870, the petitioner had power to appoint by deed to any wife who might survive him the income arising from certain settled property of the value of 8000*l.* on the death of his mother, Mrs. Caroline Eliza Benyon, widow. The petitioner, however, had never exercised such power of appointment in favour of the respondent, but he was advised that, nevertheless, if she survived him, she would be entitled during her life, to such income. On the 30th of December, 1872, a deed of separation was entered into between the petitioner, respondent, and Mr. William Henry Williams, as trustee, in which it was provided, amongst other things, that the respondent should have the custody, tutelage, and guardianship, and care of the only child of the marriage, and should support, maintain, board, lodge, clothe, and educate him in a suitable manner, and supply him with all things necessary and proper; and that during the joint lives of herself, the petitioner, and the mother of the petitioner, should pay to the petitioner an annuity or yearly sum of 100*l.* by equal half-yearly payments. On the 2nd of December, 1874, Mr. Benyon petitioned the Court to vary the said indenture of settlement, dated the 9th of April, 1870, in certain respects therein mentioned, and to make an order upon the respondent to pay a certain sum towards the maintenance of the child, and in usual course this petition was referred to one of the registrars of the Court of Probate, who reported as follows: "In this cause the respondent has an income of 1350*l.* per annum, and (as, I think, will be admitted) for her separate use. There is one child of the marriage, a boy, of about four years old, supported by the petitioner. The petitioner had no income except an allowance of 200*l.* a year at the time of filing the petition, but some has since accrued to him, as I was informed, and I have directed evidence on this head by affidavit to be laid before the Court. The petitioner covenanted to settle certain funds on the respondent when a reversion should fall in, and insured his life to insure this advantage to her effectually. From these liabilities he seeks to be released. He asks that 200*l.* a year should be paid to him by the trustees of the

settlement for the maintenance of his son during his minority. This appears to be rather beyond the necessary allowance, but not more than would be requisite in a few years. He also asks in his petition, for 600*l.* a year (but I understand that 400*l.* a year is all that he would require) for his own benefit. The respondent's income is derived partly from foreign funds and investments not of first-rate quality. In such cases, as the income may vary, it is convenient to allow a proportionate part of the income instead of a fixed sum, and I proposed to the solicitors that one-third of the income should be allotted to the husband after deducting from the total the sum paid for the maintenance of the son. The case of *March* v. *March and Palumbo* (1) is in point, and I therefore called the attention of the solicitor to that decision. No actual agreement was arrived at on any interview with the solicitor. The respondent submits in her answer that the filing of the petition is irregular and unjustifiable, but that is a point which I apprehend is not within the scope of my report."

1875. Aug. 3. *Dr. Tristram,* for the petitioner, asked the Court to direct the trustees of the settlement to pay to him out of the income of the respondent 150*l.* a year at present, and 200*l.* a year at the end of four or five years, towards the maintenance and education of the child, and 400*l.* a year for his own use, and further to relieve him of his liability under the covenant to settle the income of the property accruing to him on the death of his mother on the respondent. He referred to *Callwell* v. *Callwell and Kennedy* (2), and *March* v. *March and Palumbo.* (1)

Inderwick, Q.C., appeared for the respondent.

Dr. Swabey, for one of the trustees, Mr. Lawrence.

Cur. adv. vult.

1876. July 11. THE JUDGE ORDINARY (President). In this case a decree nisi at the suit of the husband was pronounced on the 30th of January, 1874, and it was made absolute on the 31st of July, 1874. There was one child of the marriage. In November, 1874, an application was made for leave to file a petition for the purpose of varying the settlements, and to enable the Court to

(1) Law Rep. 1 P. & M. 440. (2) 3 Sw. & Tr. 259.

1876

BENYON v. BENYON.

make an order upon the respondent to pay a certain sum towards the maintenance of the child. The petition was filed on the 2nd of December, 1874. In this case the settlement had reference to the property of the wife, which amounted to 1350*l.* per annum; nothing was brought into settlement by the husband, but it appears that, as regards a sum of 8000*l.*, he has by it covenanted to appoint the income thereof in favour of the respondent on the death of his mother, in case the respondent survives him. The application he now makes is that he shall be allowed out of the wife's income 600*l.* a year for himself, and 200*l.* a year for the maintenance of the child, until it attains the age of twenty-one years, and he further prays that he may be relieved from the covenant to appoint in favour of his wife. Two objections are made to the prayer of this petition by the respondent, or, practically, by the co-respondent, to whom she is now married. First, the delay in the prosecution of these proceedings, in consequence whereof the respondent and co-respondent have intermarried in ignorance of any application being about to be made, and in the belief that the settlements would remain unaffected, no fresh settlements were made on their marriage. The second objection is that the petitioner and respondent for some time before the decree nisi had determined to live separate, and it was agreed that 100*l.* per annum should be allowed by the respondent to her husband, and it was contended that the petitioner ought not to have more given to him than that sum. I am of opinion that the Court has power to vary this settlement under the provisions of the statute 22 & 23 Vict. c. 61, s. 5. That section fixes no limit of time within which the Court shall exercise its powers, it merely says it shall do so after the final decree; but I quite agree that, in exercising its discretion, the Court ought to have regard to the time which has elapsed before the application is made. There undoubtedly may be such a delay as would induce the Court to refuse to interfere, but in this case I think there has not been such a delay as would lead me to the conclusion that I ought to refuse the application. The decree absolute was made in July, just before the long vacation. The petitioner made application for leave to file his petition in the following November, and the proceedings were continued with due expedition. As to the

point that the respondent and co-respondent intermarried in ignorance that proceedings to vary the settlements would be taken, I think it makes no differenee. I may say that, if the marriage had been with a person ignorant of the facts of the case, under certain circumstances the Court might have been induced to hold its hand; but here the marriage was with the co-respondent, who was cognizant of all the facts, and who knew he was contracting marriage with a person liable to be affected by the order of this Court varying her settlement. With regard to the second objection, as to the deed of separation under which the husband was to have an allowance of 100*l.* per annum, I am of opinion that the husband is not precluded, by the fact that he accepted such a sum, from taking these proceedings. I am in complete ignorance of the circumstance under which that deed was executed, but it is obvious that a husband who for some reason or other has agreed that his wife shall live apart, there being no ground for seeking a dissolution of marriage, may be willing to accept a small sum out of the wife's income rather than expose in public their matrimonial differences. The case is very different if, after a separation of that kind, the wife is guilty of conduct which entitles the husband to have the marriage dissolved. He may have been content with a small portion of the wife's income while she retains the character and position of his wife, and at the same time may reasonably object to an adulterer enjoying her property and the income thereof in her society. It would be of evil example, and morally dangerous, if the wife's pecuniary position could not be altered by reason of her adultery subsequent to her husband's acceptance of an allowance. In this changed condition of things, I think the husband is entitled to ask for a larger allowance than he agreed to accept at the time of the separation. But it should be recollected that the general principle on which the Court acts in varying settlements is to put the innocent party, as far as it is practicable, in the same pecuniary position as he was before the marriage was dissolved. If the parties had been living together at that time, it would be right that the innocent husband should be put in possession of a considerable proportion of the joint income. But that principle does not apply in the present case, for the husband was not living with his wife, and was not in the enjoyment

1876

BENYON v. BENYON.

of her income beyond the allowance of 100*l.* per annum. In such a state of facts it seems to me that I must apply some other rule. That will be that, when a wife is in the enjoyment of a substantial income, a sufficient maintenance will be allotted to the husband, having regard to his income and the position of the parties generally. In this case the respondent has an income in round numbers of 1350*l.* per annum; the petitioner has only 200*l.* per annum. Acting on the principle I have suggested, I think it will be proper to allow him out of his wife's income 300*l.* per annum for life. I think he ought also to be relieved from the covenant to appoint in favour of his wife contained in the settlement. Lastly, that he should be paid 100*l.* per annum for the maintenance of the child until he attains the age of twenty-one years, when the annuity shall be payable to the child.

Solicitors for petitioner: *Lewis & Lewis.*

Solicitors for respondent and co-respondent: *Duncan & Merton.*

Solictor for the trustee, Mr. Lawrence: *Domville, Lawrence, & Graham.*

June 13.

THE PARANA. (6664.)

Damage to Cargo—Measure of Damage—Loss of Market.

Part 469

An action under s. 6 of the Admiralty Court Act, 1861 (24 Vict. c. 10), was instituted on behalf of the assignee of a cargo of hemp and other goods against a British ship, to recover damages resulting from alleged unreasonable delay in the carriage of the goods. The owner of the ship admitted his liability, and the amount of damage was referred to the registrar, assisted with merchants, to report upon. The registrar found that there had been a fall in the market value of hemp, between the date when the ship ought to have delivered her cargo and the date when the delivery actually took place, and reported that the plaintiff was entitled to 5 per cent. interest on the invoice value of the hemp during the period of delay, and was not entitled to further compensation in respect of the delay in the delivery of the hemp:—

Held, on appeal, that the registrar ought to have included in the damages the difference between the market price of the cargo at the time when it was delivered and at the time when it ought to have been delivered.

Reversed on appl 2 P D 118 CA

THIS was a cause instituted under the 6th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), on behalf of the assignee of the bills of lading of certain goods laden on board the steamship

Parana, to recover damages resulting from unreasonable delay in the carriage of the goods. The owner of the *Parana* having admitted his liability for the damage proceeded for, an order was made directing the registrar, assisted by merchants, to report upon the amount of such damages.

The registrar made the following report, in which all the material facts are stated:—

The suit was originally instituted on the 4th of December, 1873, pleadings were filed, and a commission was issued for the examination of witnesses at Manilla and Hong Kong; and after the case had been very hotly contested throughout, and a day had been appointed for the hearing, the defendant at length, on the 14th of April, 1875, admitted his liability and consented to a reference of the accounts to the registrar and merchants. The delay, however, did not end here, for it was not until the 14th of December, eight months afterwards, that the plaintiff brought in his claim.

Affidavits having been subsequently filed by both parties, the case came before myself and the merchants on the 27th of January in this year. On that occasion David Wilkinson, the master of the *Parana*, was examined as a witness, and the log-books of the vessel, which had been brought in, were carefully analysed with reference to the course and duration of the voyage. The case was then adjourned at the request of both parties for the production of further witnesses.

On the 14th of February we again met, when Mr. John Malcolm Corrie and Mr. Joseph Alfred Noble, two produce brokers, who had made affidavits for the plaintiff, were tendered for cross-examination. Two shipmasters also, Captain William Clark and Captain William Francis Norie, were produced, the former by the plaintiff, the latter by the defendant. These witnesses having been examined, the case was again adjourned to enable the defendant to produce some witnesses who had been unable to attend on that occasion.

Owing to the engagements of counsel elsewhere, the case did not come on again until the 13th of April instant, when the defendant having stated that it was not intended to call any further witnesses, counsel were heard as well on the facts as on the questions of law which had been raised in the case.

The facts are as follow:—The *Parana* was a trading steam-vessel of 1372 tons gross and 1027 net register, and she was of 180 horse-power nominal, which the master stated was a small power for a vessel of her size. When she left England she was, according to the master, "frightfully deep," having from 1000 to 1300 tons of iron as dead weight, and she was filled up with light goods. She took ninety days to get to Hong Kong, and having there discharged her cargo, was docked, surveyed, and repaired. She thence proceeded in ballast to Manilla, where the master entered into a charterparty with Messrs. Engster & Co. to load a cargo at Manilla and Ilo-Ilo, and to proceed therewith to London, passing through the Suez Canal. In pursuance of the charterparty she took on board some parcels of hemp and sugar at Manilla, and having sailed to Ilo-Ilo, she there took in further parcels of sugar; but as the charterers were not able to supply her with a full cargo, it was agreed that she should be at liberty on the homeward voyage to call in at Singapore to fill up.

1876

THE PARANA.

She left Ilo-Ilo on the 24th of July, 1873, but owing to the defective state of her boilers she was obliged, on the 30th of the same month, to put into Labuan for repairs. Thence she proceeded to Singapore, where she took in some cargo and a large quantity of coals, and having effected some further repairs to the boilers, she again proceeded on her voyage. On the 18th of August, owing to the state of the boilers, she was obliged to put into Acheen, and after effecting some further repairs, she again proceeded. On the 1st of September she had to alter her course for Point de Galle, it being found that she could only carry 11 lbs. of steam. She arrived in Point de Galle on the 4th of September, and having completed her repairs, she left again on the 9th. On the 1st of October she arrived at Aden, where further repairs were done to the boilers; and again at Port Said, at Malta, and at Gibraltar; so that it was not until the 28th of November, 1873, 127 days after leaving Ilo-Ilo, that she arrived in the port of London.

As to the lamentable state in which this vessel's boilers were there can be no two opinions. It seems that, after the vessel had discharged her cargo, she proceeded to Greenock, where her boilers were taken out. We have no information as to what may have been the condition of one of the boilers, as it was broken up before the surveyors saw it, but the other was examined by two practical engineers, who reported that of the eighty-three tubes of which the boiler originally consisted, one had never been used, and twenty-one others had been plugged up with either iron covers or wooden plugs, so that only sixty-one tubes were at all effective. It was found also that the backs of both furnaces had been patched with large patches, and that there were traces of considerable leakage on the crowns of the furnaces. There were also numerous patches on the shell of the boiler, varying from 4 ft. long by 2 ft. 3 in. wide to 12 in. long by 8 in. wide. The rivets also were worn away by long use, so that they had but little hold of the plates, and some of the plates were worn away by corrosion to half their original thickness. They further said that, although the boiler when new was constructed to bear a pressure of from 30 lbs. to 35 lbs. of steam to the square inch, they thought that, in the condition in which they found it, she could not with safety have borne a pressure of more than 10 or 12 lbs. There is no reason to suppose that the boiler which had been broken up was in any better condition. A more lamentable state of affairs can hardly be imagined. To anyone at all acquainted with the construction of steam-engines it is apparent that, with engines originally of small power, with a tubular boiler, of which twenty-two out of eighty-three of the tubes were perfectly useless, of which the plates were so much worn away that they would bear only 10 or 12 lbs. instead of 30 to 35 lbs. to the square inch, and with the crowns of the furnaces leaking badly, the available power to contend with the south-west monsoon must have been very small; and it can therefore hardly be wondered at that the vessel made on an average but four knots an hour, and that she had frequently to put into port for repairs and to replenish her stock of coals.

These being the undisputed facts in the case, we will now look at the pleadings.

The plaintiff in his petition pleaded that the sugar which had been put on board was what is called "wet sugar," from which there is more or less drainage during the voyage; and that, owing to the "unreasonable" length of the voyage, the drainage had been greater than it would have been had the voyage been of the ordinary duration; and that he had thus sustained a loss, which he estimated

at 3 per cent. of the whole amount of the sugar shipped. He also stated that, by the delay in the arrival of the vessel, he had lost a good market for the hemp, and that his loss on this account was about 20s. a ton. He claimed also interest on the invoice value of the cargo for the time during which he had been improperly kept out of it by the delay in the arrival.

In his answer the defendant, the owner of the ship, pleaded, first, that there had been no unreasonable delay in the carriage of the goods, or that, if there had been, it was due to the dangers and accidents of the seas, one of the exceptions provided for in the charterparty and bills of lading; secondly, that if there had been any excessive drainage from the sugar, it was due to the character and quality of the sugar when shipped. Both these pleas were, however, subsequently withdrawn, and the defendant ultimately admitted his liability for any damage which the owner of the cargo might have sustained by reason of the delay, and for which he would be legally liable. He has further, through his counsel, admitted in the proceedings before us that there was some unreasonable delay, and that he was ready to make good any damages necessarily resulting therefrom.

This admission of the defendant has relieved us from having to decide a question, which, I confess, appears to me to be one of very great difficulty, namely, whether there was any such implied contract on the part of the shipowner to perform the voyage within a certain time, so that if that time was exceeded owing to the defective state of the vessel's engines or boilers, the shipowner would be liable to the merchant for any loss which he might thereby sustain. I am aware of the case of *Fraser and Others* v. *Telegraph Construction and Maintenance Co.* (1), where the bill of lading having provided that the goods should be shipped on board the steamship *Hibernia*, it was held that the contract of the defendants was, that they should be carried on board a ship in which the principal motive power should be steam; but there the engines were in good working order, and the ship had a sufficiency of coals on board, but the master, from motives of economy, neglected to use them, and the voyage was consequently unnecessarily prolonged. But that is not quite the same case as the present one, where the boilers were in a bad condition, and where it is not pretended that the master did not do all in his power, by obtaining extra supplies of coal and by repairs, to expedite the vessel on her way.

But be this as it may, we are, as I have already said, relieved from having to consider this question by the admission of the defendant; and all that we have to do is to ascertain, not what would be the average time required to perform such a voyage, but what length of time might have been consumed on the voyage, beyond which the merchant would have had reasonable grounds to complain; what, in fact, would have been an "unreasonably" long voyage. For any excess beyond a reasonable time, and for all the damage directly resulting therefrom the defendant, by the terms of his admission, is liable.

The plaintiff contends that the voyage from Ilo-Ilo ought to have been performed in sixty-five, or at the most in seventy days. But to this the defendant, whilst admitting that 127 was an unreasonable time, demurs, alleging that the vessel was and was well known to the charterers to be a low-power steam-vessel, which, under the most favourable conditions, would not go under steam

(1) Law Rep. 7 Q. B. 566.

1876

THE PARANA.

more than six to seven knots an hour. Without detailing at length the evidence which has been laid before us on this point, we think, looking at all the circumstances of the case, that the plaintiff would have had no "reasonable" grounds of complaint if the voyage from Ilo-Ilo to London had lasted ninety days. But it did as a fact take 127 days; we think, therefore, that the shipowner is by his admission liable for the excess of thirty-seven days, during which the voyage lasted, beyond what may be called a not unreasonable time. Taking thirty-seven days, then, as the measure of the unreasonable delay in the voyage, let us consider what damages may be said to have resulted directly from this delay.

And, first, as to the sugar. It seems that the sugar shipped on board at Ilo-Ilo was what is called in the trade "wet sugar," and there was some evidence before us that the drainage from this species of sugar goes on continuously throughout the voyage, however long that voyage may last, and that consequently the greater the length of the voyage, the greater would be the drainage. On the other hand, it was stated that the greatest drainage takes place always in the early part of the voyage, and that when all the moisture has run off the drainage ceases; in proof of which it is said that Ilo-Ilo sugar, which has been landed and warehoused, is sold even a year afterwards on the landing weights, so small is the drainage from it after it has been warehoused. It was answered, however, that, although the drainage might cease after it had been landed and stored in a dry warehouse, it would continue during all the time it remained in the ship exposed to the heat and moist air of the hold. On the whole, the conclusion to which we have come is, that, although undoubtedly the greater part of the drainage does take place at first, it would go on, though not to so great an extent, during all the time it remained in the vessel exposed to the heat and moisture of the hold. According to the owner's affidavit the total quantity shipped was 500 tons; the quantity turned out was said to have been 446 tons 6 cwt., being a loss of 53 tons 14 cwt., or rather more than 10 per cent. on the original shipment. What we have, then, to decide is, what portion of this drainage would be due to the thirty-seven days' delay. The plaintiff puts his loss at 3 per cent., but this would be too much, unless, indeed, we are to assume that the drainage was greater at last than it was at first, which is contrary to the evidence. On the whole, we think that 1½ per cent. on the original shipment, or seven and a half tons, would be a fair allowance to make for the drainage of the last thirty-seven days. And, taking the owner's estimate of the value at 12*l.* 10*s.* per ton, we shall allow 93*l.* 15*s.* on this item of the claim.

Secondly, as to the interest. It being admitted that the defendant is liable for the damage directly arising from the unreasonable delay in the delivery of the cargo, and that delay having been fixed at thirty-seven days, it follows that interest will have to be allowed for thirty-seven days on the invoice value of the cargo, stated by the plaintiff to be 19,959*l.* 9*s.* 11*d.* We shall allow it at the usual mercantile rate of 5 per cent., which will give under this head of the claim the sum of 101*l.* 3*s.* 3*d.*

There remains the last and by far the most important question, namely, whether the plaintiff is entitled to any compensation for the alleged loss of market by reason of the non-delivery of the cargo within a "reasonable" time. The question does not arise on the sugar, in regard to which no claim has been made for loss of market, but on the hemp only.

It was said by the plaintiff that, had the vessel arrived by the middle of

October, or even by the 22nd or 23rd of October, which would be about ninety days after leaving Ilo-Ilo, the hemp could have been sold for about 41*l.* 10*s.* per ton; but that, not having arrived until the 28th of November, it was impossible to get the hemp landed and placed on the market before the middle of December, and that it was then impossible to get within 20*s.* a ton of that price. It was said that the owner continued to hold the hemp in hopes that the market would rally, but that it never did, and that ultimately he had to sell it at a considerable loss. He claimed not indeed the difference between the price at which he might have sold it, had it arrived in October, and the price at which he ultimately did sell it; but the difference between the former, and the price which he might have got for it, immediately after it had been delivered. It was shewn that during November and in the first week of December there was a fair demand for hemp at 41*l.* 10*s.* per ton, and that that price might have been obtained for it. It was also shewn that it would have taken about three weeks after the vessel's arrival to have got the hemp sampled and put upon the market; that by that time there was no demand for it, and that, although the prices current had not altered much, a seller forcing any quantity upon the market would have had to submit to a reduction of at least 20*s.* in the ton. It was proved also that after Christmas the market continued to fall, owing to large shipments of hemp brought to Liverpool, so that, as one of the brokers observed, the market was knocked all to pieces.

Assuming, then, that by the delay in the delivery there was a loss of market, the question arises whether this is an item which can be properly allowed in a claim of this description; whether, in fact, a claim for loss of market can be allowed on account of an unreasonable delay in the delivery of the goods. The case must have frequently arisen in this Court, as, for instance, when a vessel has been run into by another, and the delivery of the cargo has been delayed by the vessel having to put into port for repairs; and yet I think that I may say with certainty that no such claim has ever yet been preferred in this Court, certainly not during the time I have held this office, now nearly twenty-three years. It may be, however, that we have hitherto proceeded on a wrong principle, and as the point has been very strongly urged in this case by a counsel who is not wont to maintain an untenable position, I propose to examine carefully all the authorities which have been cited in support of that position, as well as the grounds upon which it has hitherto been thought that a claim for loss of market cannot properly be allowed.

The first case cited by Mr. Clarkson was that of *The St. Cloud* (1), but I fail to see that it has any bearing upon the present case. It was a question of estimating the loss to be paid on a cargo of wheat, which had been damaged by improper stowage, and the Court held that the proper mode of ascertaining the loss was to take the difference between the value of the damaged wheat and the price at which undamaged wheat of the same quality could have been purchased in the market at the time when the delivery took place. There was, therefore, no question of loss of market in this case.

The next case was that of *Josling* v. *Irvine* (2), but this was a case in which the defendant had sold by sample to the plaintiff a quantity of naphtha; finding out afterwards that the naphtha contained benzole, which materially increased its

(1) Br. & L. 4. (2) 6 H. & N. 512; 30 L. J. (Ex.) 78.

1876

THE PARANA.

value beyond the price at which he had agreed to sell it, he refused to make delivery, and the Court held that under these circumstances he was liable to the plaintiff for the difference between the price at which he had agreed to sell the naphtha and the price at which an article of similar quality could be purchased in the market. Here, again, there was no question of loss of market.

The case of *Collard* v. *South Eastern Ry. Co.* (1) is the one which on the whole comes nearest to the present. In that case the defendants had received some hops from the plaintiff, but instead of forwarding them at once to their destination they had kept them for some days on their premises in an open van, whereby they had become damaged by rain; the plaintiff accordingly had to have them dried before he could put them on the market, and in the meantime the market fell. It was there held that the plaintiff was entitled to recover as damages the difference between the market price, on the day when the hops after being dried were in a fit condition to be placed upon the market, and on the day when they ought to have been delivered in an undamaged state. The case, however, was a peculiar one. It seems to have been thought by the Court that the hops could, if it had not been for the negligence of the defendants, have been delivered on a day certain, and that it ought to have been known to the defendants that they were being sent for sale in the market of that day. They, therefore, held that the loss of market was "the natural result of the defendants' breach," and that it was in the "contemplation of the parties when the contract was made." The cases of *Hadley* v. *Baxendale* (2) and *Smeed* v. *Foord* (3), to which I shall presently have occasion to refer, were cited in the case, and Baron Martin, in giving judgment, said: "It seems to me that *Hadley* v. *Baxendale* (2) has no bearing on this case; and I think that *Smeed* v. *Foord* (3) was correctly decided. In my judgment the plaintiff is entitled to recover for this damage, because it is a direct and immediate loss consequent on the defendant's breach of duty." And he added, apparently not quite confident as to the correctness of the conclusion at which he had arrived: "If this case should be taken to the Court of Error, I hope that Court will be able to put the rule on an intelligible footing; but at present we must do the best we can with each particular case, and decide it upon principles of reason and good sense."

The other case cited by Mr. Clarkson was that of *Fraser* v. *Telegraph Construction and Maintenance Co.* (4), which has been already referred to, and in which it was held that, where the words "shipped on board the steamship" occurred in the bill of lading, the contract of the defendants was that the goods should be carried on board a ship in which the principal motive power during the voyage should be steam, and that consequently the defendants would be liable for the damages resulting from any unreasonable delay in the delivery. But I do not see that it was there laid down that loss of market was to be regarded as a damage, directly resulting from the delay, which the plaintiff would be entitled to claim.

Such, then, are all the cases which were cited by Mr. Clarkson, and, with the exception perhaps of *Collard* v. *South Eastern Ry. Co.* (1), I do not see that any

---

(1) 7 H. & N. 79; 30 L. J. (Ex.) 393. 7 Jur N.S. 950

(2) 9 Ex. 341; 23 L. J. (Ex.) 179. 18 Jur. 358

(3) 1 E. & E. 602; 28 L. J. (Q.B.) 178. 5 Jur N.S. 291

(4) Law Rep. 7 Q. B. 566.

of them have any bearing upon the present question. Let us now examine the authorities on the other side, which it appears to me place the question beyond all doubt.

The leading case on this point is, I apprehend, *Hadley* v. *Baxendale*. (1) In that case it was held that, where two parties have made a contract "which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

Accordingly the claim of the owner of some flour mills for the loss which he had sustained by the stopping of the mills, owing to the non-delivery of a broken iron shaft, was rejected, it not being in the opinion of the Court such a loss as would naturally have arisen in the usual course of things, or as would have been in the contemplation of the parties to the contract. Mr. Baron Alderson, in delivering the judgment of the Court, said, "For had the special circumstances been known, the parties might have specially provided for the breach of the contract by special terms as to the damages in that case." And further on he says, "But how do these circumstances shew reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill." "It follows, therefore," says Baron Alderson, "that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been justly and reasonably contemplated by both the parties when they made this contract."

This case was followed by that of *Smeed* v. *Foord* (2), which seems to me to be directly in point. In that case the defendant had contracted to deliver a threshing machine to a farmer within three weeks, for the purpose of threshing his wheat in the field. He failed to perform his contract, and the result was that the wheat got injured by rain, and had to be stacked and kiln-dried. The plaintiff claimed damages in respect of the cost of stacking it, of kiln-drying it, and for the deterioration caused by its having been wetted; he claimed also for loss of market, the market price of wheat having fallen between the time when it might have been sold had the threshing machine been supplied according to contract, and the time when it was ultimately sent to market after having been dried. The Court, on the authority of *Hadley* v. *Baxendale* (1), held that as regards the first three items of the claim, which were the natural results of the breach of contract, the plaintiff was entitled to recover, but that as regards the loss of market he had no claim. Lord Campbell, in giving judgment, said, "He is not, however, in my opinion entitled to any damages in respect of the fall in the market price of the wheat, for that could not have been in the contemplation of the parties when the contract was made; nor can it be said to have been in any way

(1) 9 Ex. 341; 23 L. J. (Ex.) 179. 18 Jur 358-9.

(2) 1 E. & E. 602; 28 L. J. (Q.B.) 178. 5 Jur N.S. 291.

1876

THE PARANA.

the natural result of the defendant's breach of contract. For aught that the parties knew, or that naturally might have happened, the price might have risen instead of fallen." The other judges all concurred in the decision, and on the same grounds.

This case was followed in 1873 by that of *Horne v. Midland Ry. Co.* (1), which was an action for delay in delivering a parcel of shoes, and in which the plaintiffs claimed the difference between the price which they would have got for the shoes, had they been delivered in time, and the price for which they ultimately sold them. But the Exchequer Chamber, per Kelly, C.B., Blackburn and Mellor, JJ., Martin and Cleasby, BB., held, on the authority of *Hadley* v. *Baxendale* (2), that the plaintiffs were not entitled to recover this sum, the damage not being such as might reasonably be considered as arising naturally from the defendants' breach of contract, or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract. The two dissentients, Lush, J., and Pigott, B., did not dispute the authority of *Hadley* v. *Baxendale* (2), but they thought that the notice which had been given to the defendants was sufficient to shew that the damages in question were such as might reasonably be considered as having been within the contemplation of the parties at the time they made the contract, as the probable result of a breach of it.

Applying, then, the principles laid down in these cases to the question under consideration, can it be said that the fall in the price of hemp was, to use Lord Campbell's words in the case of *Smeed* v. *Foord* (3), "in the contemplation of the parties when the contract was made," or that it was "the natural result of the defendant's breach of contract? For aught that the parties knew, or that might naturally have happened, the price might have risen instead of fallen."

To shew the difficulties and complications into which we should be launched if we admitted the claim for loss of market, I asked whether, if, by the delay in the arrival it had turned out that the market for the sugar had risen, whilst that for the hemp had fallen, we should be at liberty to set off the one against the other; and Mr. Clarkson admitted that we should. I asked further whether, if it had so happened that the market for the hemp had risen, we should be at liberty to set off the gain made by the delay in the delivery against the damage to the sugar by drainage and the claim for interest; and he said that he thought we should. And I then asked whether, if the gain on the former account exceeded the loss on the two last items, so that the plaintiff would have been benefited by the delay, we should be bound to credit the defendant with the difference; and he thought not. It is sufficient to point out some of the difficulties which might occur if the principle of loss of market, which could not by any possibility have been within the contemplation of the parties when this cargo was put on board at Manilla, were admitted.

It seems to me that the cases of *Hadley v. Baxendale* (2), *Smeed* v. *Foord* (3), and *Josling* v. *Irvine* (4), are conclusive on the point; and that the practice of the Court of Admiralty, in refusing to entertain any claim for loss of market

---

(1) Law Rep. 8 C. P. 131.
(2) 9 Ex. 341; 23 L. J. (Ex.) 179. 5 Jur N.S. 291 16 Jur 350.
(3) 1 E. & E. 602; 28 L. J. (Q.B.) 178.
(4) 6 H. & N. 512; 30 L. J. (Ex.) 178.

in such cases, is in entire accordance with that of the Courts of common law, and I shall refuse to alter that practice until I am corrected by superior authority. I may add that the merchants by whom I am assisted entirely concur with me in the conclusions to which I have come.

It only remains for me to say a few words in regard to the costs of this reference. The general rule in collision cases is that, where more than one-third is taken off, the claimant shall pay the costs of the reference. But this rule does not apply to cases of this description. The defendant, in the first instance, denied altogether his liability and set up several pleas which he afterwards withdrew; the condition of the boilers of his vessel was most discreditable, and he has entailed heavy losses on the plaintiff. He has, moreover, made no tender on account of the sums which the latter was undoubtedly entitled to recover. On the other hand, the plaintiff has failed on the main issue, the question of loss of market. On the whole, we think that justice will be done by leaving each party to pay his own costs of the reference, but the reference fees will have to be paid by them in moieties. H. C. Rothery, Registrar.

May 23. *E. C. Clarkson*, on behalf of the plaintiff, moved the judge in court, in objection to the report of the registrar, to modify and alter the same so far as it disallowed the sum of 289*l.* 5*s.* 9*d.* claimed as damages for the defendant's breach of contract, in respect of the depreciation in value by loss of market on the hemp. It is clear upon all the authorities that the true measure of damage is the difference between the market-price when the goods were delivered and the market-price when delivery actually took place: *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (1); *Borries* v. *Hutchinson* (2); *O'Hanlan* v. *Great Western Ry. Co.* (3); *Collard* v. *South Eastern Ry. Co.* (4); *Great Western Ry. Co.* v. *Redmayne.* (5) No reason can be given why this general rule should not apply in the present case. The damage claimed is damage which the shipowner well knew might probably flow from a breach of his contract. [He referred to the cases cited in the registrar's report.]

Watkin Williams, Q.C., and *G. Bruce*, for the defendant. The rule of giving fair mercantile interest is a constant rule which can be equally well applied in all cases, and is fair to both parties; whilst, if the measure of damages for delay is held to depend upon

(1) 9 C. B. (N.S.) 632; 30 L. J. (C.P.) 232. 7 Jur N.S. 862

(2) 18 C. B. (N.S.) 445; 34 L. J. (C.P.) 169. 11 Jur N.S. 267

(3) 6 B. & S. 484; 34 L. J. (Q.B.) 154. 11 Jur N.S. 787

(4) 7 H. & N. 79; 30 L. J. (Ex.) 393. 7 Jur N.S. 950

(5) Law Rep. 1 C. P. 329. 12 Jur N.S. 692

1876

THE PARANA.

the market value, the amount to be recovered would fluctuate from day to day and vary with the nature of the goods carried. [They referred to the notes to *Vicar* v. *Wilcocks* (1); Phillimore's International Law, 2nd ed. vol. iii. p. 698; *The Lucy* (2); *Jackson* v. *Union Marine Insurance Co.* (3); *Cory* v. *Thames Iron and Shipbuilding Co.* (4); *British Columbia Saw Co.* v. *Nettleship.* (5)]

Clarkson, in reply.

Cur. adv. vult.

June 13. SIR ROBERT PHILLIMORE. I have taken time to consider my judgment in this case, partly on account of the great number of reported cases to which I was referred, but more especially because, unfortunately, I am unable to agree with the very elaborate and carefully reasoned opinion of the registrar from whose ruling this appeal has been prosecuted. It is admitted in this case that the carrier must make some compensation to the merchant for the loss sustained by him in consequence of the delay in the execution of the contract. The question is what are to be the items of that compensation.

The registrar has found that these items are 93*l.* 15*s.* for deterioration in quality of a portion of the cargo, and 101*l.* 3*s.* 3*d.* for loss of the interest, during the detention in consequence of the delay, at 5 per cent. on the value of the cargo.

The merchant also claims, in addition to these items, the ascertained difference between the market value of the goods at the time when they might have been sold, if the carrier had not unreasonably delayed the fulfilment of his contract, and their value at the time when they did actually arrive; and the justice of this claim is the sole subject of this appeal.

The law applicable to this question has apparently been difficult to ascertain, and the application of it, when ascertained, more difficult.

The general rule of law is stated with his usual clearness by M. Masse, in the last edition of his Droit Commercial, ed. 1862, t. 3, lib. v. tit. 1, ch. iii, s. 4, p. 239: "Mais, comme on l'a déjà vu,

(1) Sm. L. C. vol. ii. 534, ed. 1876.
(2) 3 Rob. 208.
(3) Law Rep. 8 C. P. 572; Law Rep. 10 C. P. 125.
(4) Law Rep. 3 Q. B. 181.
(5) Law Rep. 3 C. P. 499.

même dans le cas de dol, les dommages-intérêts ne peuvent comprendre, à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de l'obligation. La responsabilité de l'imprévu ne s'étend pas aux faits successifs, qui sont la conséquence éloignée de l'inexécution ou du retard dans l'exécution." The principle of this rule is in different words expressed in the English and American judgments.

In accordance with this principle, the carrier has been holden liable to pay damages, on the hypothesis that he contemplated payment of a certain kind of compensation in the event of his not executing, or of his unreasonably delaying to execute, his part of the contract.

Another form of stating this proposition is to be found in the judgment of the Lord Chief Baron, in the Exchequer Chamber, in *Horne* v. *Midland Ry. Co.* (1), decided in the year 1873, where his lordship states the principle clearly to be deduced from all the authorities to be, "that the damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The last English judgment which I have been able to find is one delivered by the Lord Chief Justice in 1876, in the case of *Simpson* v. *London and North Western Ry. Co.* (2) It is the only English case, I think, for the knowledge of which I am not indebted to the industry of counsel. "The law," the Lord Chief Justice says, "as it is to be found in the reported cases, has fluctuated, but the principle is now settled that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object." 2 PD. 120

The latest American decision, I believe, is that of *Ward* v.

(1) Law Rep. 8 C. P. 131, 137. (2) 1 Q. B. D. 274.

1876

THE PARANA.

New York Central Ry. Co. (1) It is thus stated in a note to the 6th edition of Sedgwick on Damages, p. 433:—"It is here held that, where a carrier from mere negligence or plain violation of duty omits to transport merchandise within a reasonable time, and its market value falls in the meantime, 'the true rule of damage is the difference in its value at the time and place it ought to have been delivered, and the time of its actual delivery,' the Court observing that 'sagacious men rely upon their ability to judge of the market in undertaking large commercial projects, and according to their views of the market, send their merchandise by a quick or by a slow carrier, and make compensation accordingly. A contrary rule would deprive them of all benefit of a rapid transit.' The Court further remarked: 'Had the goods been injured by reason of improper exposure by the carrier, and thus become depreciated in their market value, the carrier would be liable for the loss. Here his negligent delay caused the loss'; the injury also is natural and direct. Arriving later by the carrier's negligence, these goods, measured by the rule that governs the commercial community—by the only standard that regulates values, were not worth so much as at the time when they should have arrived."

I do not refer to other cases besides these two, but I have read them all with care; most of them will be found in the notes at p. 81, ch. iii. and p. 430, ch. xiii. in Mr. Sedgwick's valuable work on the Measure of Damages, 6th edition, to which I have already referred.

The result of the reported decisions is that the merchant may claim to be indemnified for actual loss in the value of the goods shipped (perte qu'il a faite; damnum emergens), and from loss of profit (gain dont il a été privè; lucrum cessans), when such loss is the direct consequence of the carrier's default. Why should not the ascertained difference between the market price, when the goods might have been sold, had there been no delay, and the market price which they would fetch after the delay, be a reasonable measure of the loss of the merchant's profits? The depreciation is the direct consequence of the carrier's default; in other words, he must be taken to have known or contemplated that the

(1) 47 N. Y. 29.

merchant desired a safe and quick transport of his marketable goods to their intended market. This is the ordinary knowledge with which a carrier receives goods, and it is on this principle, as it appears to me, that in *Horne* v. *Midland Ry. Co.* (1), already cited, the difference between the two market prices was considered to be the proper measure of the damages. The case before me is not one of a special private speculation or particular mercantile operation; it is one of the ordinary operations of commerce, in which delay may inflict as much injury on the shipper with respect to the market value of the goods as their deterioration from want of requisite appliances or improper exposure during the passage. Upon the same principle the carrier is responsible for both injuries.

The depreciation in the market value of these goods has been, in my opinion, the natural consequence of the carrier's unreasonable delay, propter rem ipsam non habitam, as the civilians say, and, for the reasons already alleged, I think the shipper is entitled to have included in his damages the difference between the market price at the time when the goods did arrive and at the time when they ought to have arrived.

I must therefore direct that the registrar's report be varied by adding to the damages allowed the sum of 289*l.* 5*s.* 9*d.* which represents the loss of market.

I think that the justice of the case demands that the plaintiff has his costs of the appeal and of the reference.

Solicitors for plaintiff: *Stibbard & Cronshey.*
Solicitors for defendant: *Parker & Clarke.*

(1) Law Rep. 8 C. P. 131.

1876
August 1.

THE STAR OF INDIA. (K. 94.)

Collision—Measure of Damage—Loss of Charterparty.

5 PD 232
234
App Cas
560

A barque, lying in the Madras Roads, was chartered to proceed to the Coromandel coast, and there load a cargo for London, at a freight of 55*s.* per ton. When about to proceed to her loading port, she was run into and seriously damaged by a ship whose owners admitted their liability for the collision. At a reference before the registrar, assisted by merchants, to assess the damages, it was proved that, owing to the barque having been delayed at Madras for repairs, rendered necessary by the collision, the charterers had acquired a right to cancel the charterparty, and that they had cancelled the charterparty; afterwards, when the repairs were completed, the barque being unable to procure more profitable employment, sailed from Madras for London with cargo, at a freight of 45*s.* per ton. The registrar disallowed a claim made by the plaintiffs in respect of the loss of the charterparty so cancelled, and the plaintiffs appealed to the Court:—

Held, that the case must be again referred to the registrar, with directions to include in the amount of damages a sum in respect of the loss of the charterparty.

THIS was a petition in objection to the report of the registrar in an action of damage, instituted on behalf of the owners of the barque *Cheviot* against the ship *Star of India*, and her freight.

The petition in objection alleged substantially as follows:—

1. This is an action to recover certain damages alleged by the plaintiffs to have been sustained by them in consequence of a collision between the plaintiffs' vessel, the *Cheviot*, and the defendants' vessel, the *Star of India*. The defendants admitted liability for the damage proceeded for, and on the 31st of December, 1875, such damage was referred to the registrar, assisted by merchants, to report upon the amount thereof.

2. The registrar on the 27th of March, 1876, made his report. By this report all the items of the plaintiffs' claim are allowed, except the following: Loss of charterparty, 583*l.* 18*s.* 9*d.* This item is disallowed. The registrar has further reported that the plaintiffs should pay the reference fees, but that otherwise each party ought to pay his own costs of the reference.

3. The plaintiffs object to this report in so far as it disallows the above item and makes the above order as to costs, for these reasons (among others):—

(a.) At the time of collision the *Cheviot*, which was in Madras Roads, was under charter to take a cargo from the Coromandel coast (1) to London, at the rate of 83*s.* per ton, net weight delivered, and was heaving short, in order to proceed to Gopalpore, the first port under the charter. The cargo which she would have carried would have been a dead-weight cargo.

---

(1) The charterparty provided that the ship should proceed to two ports on the Coromandel coast to be declared. The charterers to have the option of cancelling the charterparty if the vessel should not arrive at the first loading port and be ready to take in cargo before the 10th of April, 1875. It appeared that on the 22nd of March Gopalpore was declared as the first port.

(b.) The collision occurred on the 1st of May, 1875, and as the *Cheviot* was so damaged that she could not possibly reach Gopalpore by the 10th of May, the charterers, in accordance with a power given to them to that effect, cancelled the charter.

(c.) By the time the *Cheviot* was repaired the season had nearly closed and freights had fallen.

(d.) The *Cheviot* was not sufficiently repaired to take in cargo till the 4th of July, nor sufficiently repaired to proceed to sea till the 13th of July.

(e.) On the 4th of July the *Cheviot* could have been chartered for a similar voyage to that on which she had been chartered at the rate of 45*s.* a ton; but she could not have sailed for the ports of loading till on or after the 13th; instead thereof she was loaded at Madras on and after the 4th of July, at the rate of 45*s.* per ton of measurement goods.

(f.) The plaintiffs claim is for the difference between the freight which the *Cheviot* would have earned under the cancelled charterparty and that which she earned under the loading at Madras. The plaintiffs have not claimed or received demurrage for the detention of the *Cheviot* after the 4th of July.

(g.) If the plaintiffs succeed wholly or partially in this claim, the costs of the reference ought to be awarded to them.

The petition prayed the Court to order the report to be reformed by allowing to the plaintiffs the said sum of 583*l.* 18*s.* 9*d.*, or such part thereof as to the Court might seem just.

The report of the registrar was annexed as an exhibit to the petition in objection. So far as is material it was in terms as follows:—

I find that there is due to the plaintiffs, in respect of their said claim, the sum of 577*l.* 19*s.* 10*d.*, together with interest thereon as stated in the schedule hereto annexed. And I am also of opinion that each party ought to be left to pay his own costs of the reference, the reference fees to be paid by the plaintiff.

Admiralty Registry, March 27, 1876. H. C. Rothery, Registrar.

The schedule annexed to the report was as follows:—

	Claimed.			Allowed.		
	£	s.	d.	£	s.	d.
1. Demurrage of the barque *Cheviot*, of 494 tons, at 4*d.* per ton per day, from 1st May to 4th July, 1875, viz. 65 days . .	535	3	4	535	3	4
2. Loss of charterparty . .	583	18	9	0	0	0
3. Surveyor's fees at Madras . .	15	16	3	15	16	3
4. Telegrams from Madras . .	16	15	3	16	15	3
5. Telegrams from Glasgow to Madras	6	10	0	6	10	0
6. Repairs to figure-head . .	3	15	0	3	15	0
	£1161	18	7	577	19	10

1876

THE STAR OF INDIA.

With interest at 4 per cent. per annum, from the 4th of July, 1875, until paid.

The answer of the defendants contained the following allegations:—

The alleged damage claimed by the plaintiffs in respect of the loss of the said charterparty was too uncertain and too remote, and it was therefore properly disallowed by the registrar.

Regard being had to the demurrage allowed to the plaintiffs, and to the other facts and circumstances of the case, the plaintiffs failed to prove that they had in fact incurred any loss by reason of their not having fulfilled the said charterparty, and on the contrary the profits actually earned by the plaintiffs were fully equal to the profits which they would have earned, had the *Cheviot* performed the said voyage to Gopalpore and received her intended cargo and proceeded to London therewith, and delivered the same there.

The defendants have always been ready and willing to settle the claims of the plaintiffs other than the said claim for loss of charterparty, from which latter claim alone the necessity for the reference arose.

It appears by the judgment that the principal facts alleged in the petition in objection were supported by the evidence produced before the registrar.

July 11, 18. *Watkin Williams, Q.C.*, and *W. G. F. Phillimore*, for the plaintiffs in objection to the report. The plaintiffs were prevented by the collision from fulfilling the charter they had entered into, and from earning the amount of freight due thereunder. It is true that the plaintiffs are not entitled to recover from the defendants the entire amount stipulated for on the charterparty, inasmuch as they obtained a cargo from Madras at a lower rate of freight, but they are clearly entitled to some sum in respect of the loss of their charter even after all reasonable deductions have been made: *Jebsen* v. *East and West India Dock Co.* (1) The rules applicable in cases of contracts do not govern in cases of tort: *France* v. *Gaudet* (2), *Davis* v. *Garrett* (3), *Rowley* v. *London and North Western Ry. Co.* (4) At the time of the collision the adventure for which the barque was chartered had virtually commenced, and if insured for the voyage, the vessel would have been at the risk of her underwriters: Maude and Pollock, Merchant Shipping, p. 305, ed. 1861.

E. C. Clarkson, for the defendants. Sufficient compensation has been allowed the plaintiffs. The damages they seek are too re-

(1) Law Rep. 10 C. P. 300.
(2) Law Rep. 6 Q. B. 199.
(3) 6 Bing. 716.
(4) Law Rep. 8 Ex. 221.

mote and uncertain: *Hoey* v. *Felton* (1); *Walker* v. *Goe.* (2) The immediate cause of the loss of the charterparty was the act of the charterers in exercising their option to cancel the charter. The only cases in which, by the practice of the Court of Admiralty, the loss of a charterparty has been considered in assessing the damages occasioned by a collision, are cases where a vessel has been damaged when at her loading port ready to take on board her cargo. Here the barque, if she had started from Madras, might have never arrived at her loading port in safety.

[SIR ROBERT PHILLIMORE referred to the *Parana.* (3)]

In giving the plaintiffs demurrage for sixty-five days the registrar took into consideration that the barque was lying idle for that time without employment. If, in addition to this, the plaintiffs receive damages in respect of the loss of the charter, they will receive more than they would have received if their vessel had been able to proceed to the loading port named under the charter.

Phillimore, in reply.

Cur. adv. vult.

Aug. 1. SIR ROBERT PHILLIMORE. The *Cheviot,* a vessel of 494 tons, was run into on the 1st of May, 1875, while at anchor in Madras Roads by the *Star of India.* This vessel admitted her liability, and the usual reference was ordered to the registrar, assisted by merchants, to ascertain the amount of damages. On the 27th of March, 1876, the registrar made his report, in which all the items of the plaintiffs' claim were allowed except one: each party to pay his own costs. The item not allowed was for the loss of a beneficial charterparty estimated at 583*l.* 18*s.* 9*d.*; the whole of this sum was disallowed. Against this ruling, and against that which left each party to pay his own costs, the owners of the *Cheviot* have appealed. The case has been ably and carefully argued before me. The following averments in the petition are proved or admitted:—[His Lordship here read paragraphs (a) to (e) of the third article of the petition in objection.] The clauses of the charterparty to which it is necessary to refer are the following:—"Twenty-five working days are to be allowed the charterers or their agents (if the ship be not sooner dispatched) for loading the said

(1) 11 C. B. (N.S.) 142; 31 L. J. (C.P.) 105. 8 Jur N.S. 704

(2) 3 H. & N. 395; 4 H. & N. 350; 27 L. J. (Ex.) 427; 28 L. J. (Ex.) 184.

(3) Ante, p. 452. 5 Jur N.S. 738

1876

THE STAR OF INDIA.

ship on the Coromandel coast, to commence twenty-four hours after the captain has given notice in writing to the charterers' agent that he is ready to receive cargo, and ten days on demurrage over and above the said laying days at 120 rupees per day, to be paid to the master day by day as due, at his option. Time occupied in changing ports not to count as lay days. Lay days not to commence before the 10th of April, 1875. Charterers to have the option of cancelling this charterparty if the vessel do not arrive at first loading port, and be ready to take in cargo by the 10th of May."

The main ground upon which the registrar founded his rejection of the item of the loss of the beneficial charterparty, and which has been insisted upon in the argument before me, was that the claim for damages on this account was too remote. This was the main ground; but the registrar appears also to have holden that the proximate cause of the loss was the option given by the charterparty to the charterers, and which they exercised by cancelling the agreement, because the ship did not arrive so as to be ready to take in cargo by the 10th of May.

I may dispose of this latter question first. I am unable to see how the granting of this option, which it was perfectly competent for the owners of the *Cheviot* to make, can be in any legal sense considered the real or proximate cause of the loss. But for the damage, there is every presumption that the *Cheviot* would have arrived in proper time, and that there would have been no opportunity given for the exercise of the option.

With regard to the main objection of remoteness, it has been contended that the ordinary length of the voyage from Madras to Gopalpore was six days; and, though it is admitted that the ship had three days over the time necessary for the accomplishment of it, and that at the time the collision happened, according to the evidence of the captain, the *Cheviot* "was ready to proceed to Gopalpore, which was the first port she had to proceed to on the Coromandel coast to load, and at the time the collision happened we were actually heaving short on board the *Cheviot*, for the purpose of getting under weigh for the purpose of proceeding to the said port of Gopalpore." The voyage may therefore be said to have begun, but it is contended that, nevertheless, the ship might have met with some perils before she arrived at her loading

port—might have been lost, or at least delayed by bad weather, and that all the plaintiffs can be said to have lost was the chance of performing the charterparty, which is too remote an item to be taken into account in the consideration of compensation. The answer to these objections appears to me to be that, though they may avail to shew that the whole sum which represents the loss of the beneficial charterparty cannot be claimed, but that a certain deduction should be made from it, they do not avail to shew that the item should entirely be struck out.

With respect to various decisions which were cited relating to cases of insurance contracts and the like, I must observe that this is the case of compensation demanded from a wrongdoer, and governed by different principles of law. In the case of *The Halley* (1), I said what I must now repeat:

I gladly avail myself of Dr. Lushington's language in this matter in a case in which he distinguishes (speaking of the duty of the registrar and merchants as referees of the High Court of Admiralty) between cases of collision and cases of insurance. "One," he—Dr. Lushington—says, "of the principal and more important objections to the report under consideration is this, that the registrar and merchants, in fixing the amount to be paid for repairs, and the supply of new articles in lieu of those which have been damaged or destroyed, have deducted one third from the full amount which such repairs and new articles would cost. This deduction, it is said, has been made in consideration of new materials being substituted for old, and is justified upon the principle of a rule which is alleged to be invariably adopted in cases of insurance. The first question, then, which I have to consider is the applicability of the rule in question to a case of the present description; and this question, it is obvious, involves a principle of considerable importance, not only as regards the decision in this particular case, but as establishing a rule for assessing the damages in all other similar cases. Now, in my apprehension, a material distinction exists between cases of insurance and cases of damages by collision, and for the following reasons;" and then the learned judge explains the nature of an insurance contract, and he continues: "With regard to cases of collision, it is to be observed that they stand upon a totally different footing. The claim of the suffering party who has sustained the loss arises, not ex contractu, but ex delicto of the party by whom the damage has been done, and the measure of the indemnification is not limited by the terms of any contract, but is co-extensive with the amount of the damage. The right against the wrongdoer is for a restitutio in integrum, and this restitutio he is bound to make without calling upon the party injured to assist him in any way whatever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur) the party in fault must bear the inconvenience. He has no right to fix this inconvenience

(1) Law Rep. 2 A. & E. 3.

1876

THE STAR OF INDIA.

upon the injured party, and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden which the law will not place upon him."

In the more recent case of *France* v. *Gaudet* (1), the distinction, between an action of contract for the recovery of damages and an action against a wrongdoer, appears to have been very clearly taken. Lastly, it has been contended that the grant of demurrage in this case of 4*d.* per ton per day from the 1st of May to the 4th of July—sixty-five days—put an end to any claim founded on difference of freight, and includes the profitable employment of the ship during that time: that 2*d.* per ton covers the expenses, and the other 2*d.* per ton compensates the non-use of the capital. I am not of opinion that on those accounts the claim founded on the difference of freight is extinguished. It is not merely the beneficial charterparty which is lost, but also the sixty-five days during which the vessel has not been beneficially employed; and upon the whole I am of opinion that I must refer this matter again to the registrar, with the assistance of merchants, to report upon what may be, in the circumstances, according to their opinion, a compensation for the loss of the beneficial charterparty. The whole sum, viz. 583*l.* 18*s.* 9*d.*, ought not to be granted, and, indeed, is not claimed. Among the deductions from that sum will have to be considered the difference between a voyage from Madras to London, and from the Coromandel coast to London; the saving of what is called wear and tear to the vessel, and the uncertainties and perils incident to all sea voyages. Other circumstances justifying deductions will, perhaps, suggest themselves to the great experience of the registrar and merchants, as to which I have no desire to fetter their discretion.

The judgment which I now deliver is that the item for the loss of the beneficial charterparty, which, as being too remote and uncertain, has been disallowed, ought to be considered and allowed, subject to all just and reasonable deductions.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Saxton & Son.*

(1) Law Rep. 6 Q. B. 199.

THE CARGO EX SCHILLER. (7353. 7354. L. 11.)

1876
March 15.

Salvage—Salvage Services rendered in saving the Lives of Passengers in Danger—Right of Life Salvors to arrest Cargo recovered by Divers subsequently to Services in Respect of which Salvage Remuneration is claimed.

A German steamship was wrecked in British waters and the lives of ten of her passengers were saved by the crews of a pilot cutter and three gigs. Subsequently divers, employed by the owners of the cargo of the steamship, succeeded in recovering from the wreck a large amount of specie. A cause of salvage was instituted on behalf of the owners and masters and crews of the pilot cutter and the gigs against the specie:—

Held, that the plaintiffs were entitled to be paid salvage remuneration out of the proceeds of the specie.

Affirmed on appl 2 P D, 145.

THESE were consolidated actions of salvage instituted on behalf of the owners, masters, and crew of the pilot cutter *Rapid* and the boats, *O. and M.*, *Guinevre*, and *Swift*, all of the Scilly Islands, against certain cargo, lately laden on board the German steamship *Schiller*, and against the owners of such cargo.

The statement of claim delivered in the consolidated actions in the first twenty-two paragraphs narrated the circumstances under which, on the morning of the 8th of May, 1875, the *Rapid*, the *Guinevre*, and the *O. and M.* had started from the island of Saint Agnes, and the *Swift* from the island of Bryer, and the plaintiffs on board, twenty-five in all, had succeeded in saving the lives of ten persons, who had been passengers on board the *Schiller* when that vessel was wrecked on the night of the 7th of May, 1875, on the Retarrier Reef, about three quarters of a mile south-east by east of the Bishop's Rock lighthouse, and were picked up in an exhausted state, two out of broken lifeboats belonging to the *Schiller*, the remainder whilst floating in the water near the place where the wreck had occurred.

It also appeared from other allegations in the same paragraphs in the statement of claim, that, after the passengers had been rescued, they were taken in safety to the island of St. Mary, and that the news of the disaster to the *Schiller* was first made known at that island by the plaintiffs, from whence other and further assistance was dispatched, and to two fishing boats, who saved five lives.

1876

THE CARGO EX SCHILLER.

The 23rd paragraph of the statement of claim was in terms as follows:—A small portion of the stores and hull of the *Schiller* have been saved. The total value of the property saved is 40,000*l.*

From answers to interrogatories, it appeared that, since the salvage services had been rendered, the crew of the *O. and M.* had received the sum of 75*l.* from three of the passengers they had rescued, and that, long after the institution of the consolidated actions, the vice-consul of the German government at Scilly had paid 1*l.* to each of the four men who had formed the crew of the *Swift.* With the exception of these sums no remuneration whatever in respect of the services they had rendered had been received by any of the plaintiffs.

The statement of defence alleged, inter alia, as follows:—

1. The defendants admit the statements of fact in articles 1 to 22, both inclusive, of the statement of claim.

2. The services of the plaintiffs to the passengers of the *Schiller* were rendered at some risk to themselves, but not at great risk.

3. The said passengers were not the owners of the cargo proceeded against in this action, and the plaintiffs rendered no services to, and did not attempt to save, the said cargo or the owners thereof. Such cargo was saved under the circumstances in the next article mentioned.

4. Some time after the wreck of the *Schiller*, and after the vessel was partially broken up and, with her cargo, had sunk in deep water and had been abandoned by all concerned, the defendants determined to endeavour to raise six barrels of specie belonging to them, and which were known to be in the vessel's hold. The defendants thereupon engaged a staff of divers and workmen, and worked for many weeks at great expense and with great uncertainty as to the success of their operations. During this time, and so long as it remained doubtful whether the operations would not be altogether unprofitable, the plaintiffs did not profess to be interested in or to have a claim against the cargo in respect of which the operations were proceeding.

5. After many weeks of unsuccessful and unremunerative operations, the defendants succeeded in raising four of the barrels of specie and a portion of the contents of another barrel, of the total value of 40,000*l.*, and the specie so saved was conveyed to Penzance. This specie is the cargo proceeded against in this action.

8. Numerous portions of the *Schiller*, and of her tackle, apparel, and furniture had been saved and recovered by persons other than the defendants prior to the commencement of these actions, but the plaintiffs made no attempt to enforce a claim against such property.

9. The plaintiffs respectively have received, or are entitled to receive, and can upon application receive from the passengers to whom they rendered the said services, and from the owners of the *Schiller*, and from the German government, ample remuneration for their said services.

10. The *Schiller*, at the time of her loss, was a German ship, sailing under the German flag, and by the law of Germany, the ship and the owners thereof and the passengers themselves are liable for the remuneration of the services in the statement of claim mentioned, and the defendants, as owners of the cargo on board the said vessel, are not in the circumstances aforesaid liable for such remuneration.

The reply contained, inter alia, the following allegations:—

1. It is not true, as stated in the 4th paragraph of the statement of defence that, during the time therein mentioned, the plaintiffs did not profess to be interested in or to have a claim against the cargo therein mentioned.

3. It is not true that any portion of the *Schiller*, or of her tackle, apparel, or furniture, which were or are of any appreciable value, had or have been saved or recovered.

4. It is true, as stated in paragraph 10, that the *Schiller* was, at the time of her loss, a German ship sailing under the German flag, but with this exception, the several allegations in paragraphs 9 and 10 are untrue.

5. At the time of the render of the services stated in the statement of claim, the *Schiller* was a ship stranded or in distress on the shore of a sea or tidal water situate within the limits of the United Kingdom, and the services so stated were rendered wholly or in part in British waters.

March 13. The case came on for argument. No witnesses were called, but it was admitted that the services had been rendered in British waters.

The Admiralty Advocate (*Dr. Deane, Q.C.*) and *W. G. F. Phillimore*, appeared for the plaintiffs. They referred to 17 & 18 Vict. c. 104, s. 458; 25 & 26 Vict. c. 63, s. 59; order in council of the 7th of April, 1864, extending the provisions of the Merchant Shipping Acts as to life salvage to Prussian ships; *The Johannes* (1); 24 Vict. c. 10, s. 9; *The Willem III.* (2); *The Fusilier* (3); *The Cairo.* (4)

Butt, Q.C., and *Lodge*, for the defendants, contended that the provisions of the statutes regulating life salvage were not such as to entitle the plaintiffs to proceed against cargo which had been recovered, long subsequent to the services rendered by the plaintiffs, by agents employed for the purpose by the owners of the cargo.

Cur. adv. vult.

(1) Lush. 182.
(2) Law Rep. 3 A. & E. 487.
(3) Br. & L. 341.
(4) Law Rep. 4 A. & E. 184.

1876

THE CARGO EX SCHILLER.

March 15. SIR ROBERT PHILLIMORE. This is a suit for salvage brought by a pilot cutter and some small boats against a portion of the cargo recovered from the North German ship *Schiller*, which went to pieces not long ago off the Scilly Islands.

The suitors are the *Rapid*, a pilot cutter, valued at 500*l.*, with a crew of eight hands on board her; the *O. and M.*, a six-oared gig, of the value of 40*l.*, with six hands on board her; the *Guinevre*, a six-oared gig, also of the same value, with seven hands, including Stephen Hicks, her coxswain; and the *Swift*, a boat belonging to the island of St. Agnes, with a crew of four hands, including her coxswain, Uriah Legg.

It appears that, on the 7th of May last year, shortly before midnight, they heard the whistle of a steamer and the report of a gun at the island of St. Agnes, and there was at that time a very dense fog over the whole of the Scilly Islands. It appears that, nevertheless suspecting that some vessel might be in danger, the crew of the *O. and M.* started from the island of St. Agnes towards what is called the Western Rocks. The crew of the *Guinevre* put off and proceeded in the same direction.

The weather at the time continued densely thick with fog; the wind was from the S.W., and a very heavy sea was running through the rocks and breaking over the sunken ledges, between which the boats had to pass before they could get outside, to such an extent as to greatly imperil the lives of those on board them. All these facts seem to be admitted with the exception of one—the greatness of the danger, as to which the admission is qualified; for the defendants say, though there was some danger, there was not very great danger.

The wind increased as they went on. The fog shut out all landmarks, and, notwithstanding that many of them were licensed Trinity pilots, they had great difficulty in making their way.

One of the men, being on the island of Bryer, saw three spars wash on shore and some broken deck planks, and, summoning the crew of the *Rapid*, he got under way and passed down the channel between the islands of Samson and Bryer, with some difficulty. The statement of claim then goes on to state that Uriah Legg, who was on the look-out hill above Smith's Sound on the island of St. Agnes, between six and seven on the same morning, saw a

broken ship's lifeboat drifting to the southward with something dark in it, which he could not distinguish for the fog, and immediately launched the *Swift* and went in the direction of the lifeboat, and rowing up to her, found that she belonged to the *Schiller*, and that there was lying in her a passenger groaning, benumbed with cold, and in a very weak state. The lifeboat was very much damaged, one-half of her port side being clean gone. She was floating on a level with the water, and the passenger was immersed in water except his head and shoulders, and he had lost all power of speech. They took him on board and took all proper measures to restore him to animation. In the meantime, the other boats were going to the wreck of the *Schiller*, and the statement of claim goes on to shew that they went in the direction of the cries between the rocks which are called Mincarlo and Minalto, the channel between which is filled with sunken rocks and ledges, and saw one man floating on the water, and, going on, saw another man, whom they rescued. It appears that the *Rapid* made some tacks to see if there were any men floating on the water, but not seeing any, and finding the men they had got required care, they rowed to St. Mary's for medical assistance. Whilst so proceeding they passed quantities of boxes, clothes, and trunks, which they did not stop to pick up, being anxious to obtain assistance for the two men. I mention that fact because it is not disputed and appears to me really to the credit of the salvors. They then rowed through a quantity of wreckage and eventually saved six men; and upon the whole they saved ten lives themselves, and may be considered as indirectly saving more, because they made use of a steamboat which was going to Penzance, and sent word of the distress and danger in which the other men were, and some of those men were saved on board the steamer.

Now a question of law has been raised with respect to these services, and, first of all, it has been contended that the cargo is not liable to pay any salvage remuneration for the saving of the lives of these people. It is admitted that no part of the cargo or the ship was saved by the salvors, and their claim is rested exclusively and entirely on the preservation of human life. It was admitted that this question had been much discussed in the case of *The Fusilier*, both in the High Court of Admiralty and in the

1876

THE CARGO EX SCHILLER.

Judicial Committee of the Privy Council, and that an adverse decision had been come to in both these Courts, but it was pressed upon me that the decision might be erroneous and might be reviewed before another tribunal. I will quote shortly from that case, which is to be found in the 3rd vol. of Moore's Privy Council Reports (N.S.), p. 51. In that case my learned predecessor, in delivering the judgment of the Court of Admiralty, said,—"Several questions of law have arisen respecting what is called life salvage, and to these questions I will address my attention before considering the particular facts of the case. First, then, as to the old law respecting salvage of life when not connected with the salvage of property—the law before any statute was passed on the subject. There is, I apprehend, no doubt that the law was that where no ship or cargo had been salved, no property rescued from destruction, but lives had been saved from the ship, no suit for salvage reward could be maintained. One reason for this state of the law was that no property could be arrested applicable to the purpose. There could be no proceeding in rem, the ancient foundation of a salvage suit. It is true that an anomalous case did sometimes arise where one set of salvors exclusively salved life and another, wholly distinct, salved the ship and cargo; but, even in these circumstances, the salvors of life alone could not render the property amenable to their claims. Then, as to the case where life and property had both been salved by one set of salvors, it was the practice of the Court to increase the amount of salvage which would have been given if property only had been saved, and such doctrine does, I think, rest on too high authority to be doubted. The practice, too, was that all the property salved should pay in such increased rate of salvage—the ship, the freight, and the cargo, each in proportion to its value. Such being the state of the law and the practice of the Court, the question arises, what was the grievance which required the interposition of the legislature? That grievance clearly was, that persons who had risked their own lives perhaps and salved life only, or with so little property as not to afford the payment of an adequate reward, could not be justly compensated. That was the grievance intended to be remedied. No doubt the leading motive for a legislative enactment to remedy this grievance was to encourage the salving of life, but there was

a subsidiary ground, the encouragement of salvors generally; for reward of life salvage operates as a further incentive to salvage exertions. This being so, it would be reasonable to suppose à priori that the remedy given by the legislature would be commensurate to the evil and effect no further change."

And then the learned judge enters into a consideration of the sections of the Merchant Shipping Act (17 & 18 Vict. c. 104), both of s. 458 and of s. 459, and he comes to the conclusion that the cargo was clearly liable to pay the life salvage.

The matter was argued on appeal before the Privy Council, and I had the honour, I think, of appearing for the appellants, Dr. Deane appearing for the respondents.

The question was very fully gone into indeed and very carefully considered in the Privy Council, and Lord Chelmsford delivered judgment, and said: "The general rule as to the parties liable to pay salvage is that the property actually benefited is alone chargeable with the salvage recovered. But this rule is inapplicable in the case of life salvage, because it is difficult to imagine a case where the saving of the lives, either of the crew or of the passengers of a vessel in distress, would be of any benefit either to the vessel or to the cargo. The legislature, therefore, could not have intended that the benefit to property should be the criterion of the liability to the payment of life salvage. All that seems to have been contemplated is that there should be included in the entire sum payable for salvage of ship and cargo a distinct reward for the preservation of human life." Then his Lordship goes into the question of the 458th section of the Merchant Shipping Act, which was much discussed before me, and says: "The legislature seems merely to have had in view the rewarding at a higher rate persons whose services were more meritorious from having rescued human life as well as property from peril, and almost to have assumed that the liability to the salvage would attach without any distinction upon all the owners of property exposed to the common danger." And then entering into a consideration of the 468th and 469th sections of the statute, as removing any doubt that the previous section might have created on this point, his Lordship ended the judgment by saying: "The object of the legislature in the different sections referred to seems to have been to give a

1876

THE CARGO EX SCHILLER.

legislative sanction to the practice of the Court of Admiralty of indirectly rewarding salvors for the preservation of human life by allowing the value of their services to be made the subject of a distinct estimate, but without intending to fix the responsibility of payment upon one class of owners of the property involved in the common peril more than on another."

Now it has been contended, as I have already observed, that these judgments are erroneous, and would be reconsidered and perhaps reversed before another tribunal. I am not of that opinion myself, but I am clearly of opinion that if I were, it would be improper in me to give a judgment in any way at variance with the decision of my predecessor and the Privy Council in this matter, and I decline to do so. It is then contended that there is a distinction between this case and *The Fusilier* (1), namely, that in this case the cargo was saved afterwards by the owners, and there was no cargo saved at the time, as I understand the argument, when the lives of these passengers were saved. Now, I confess I am unable to follow any distinction in principle between the case of *The Fusilier* (1) and the case now before me. The argument that it is not a case for salvage reward because the owners saved the property afterwards seems to me untenable. The value of the property saved, no doubt, by the owners themselves, in this case amounted to about 40,000*l.* in specie. I think that cargo so saved was liable, under the statute to which I have referred, in accordance with the principles of the judgment I have adverted to, to pay salvage remuneration to those who saved the lives on board the vessel, by whomsoever that property was saved, whether by another set of salvors, or whether saved by the owners, as alleged in this case. I am of opinion, therefore, that the judgment in *The Fusilier* (1) binds me, and that I must follow it on the present occasion, and it remains only to say what amount of remuneration the Court ought to award. The property is very large, 40,000*l.*, but the services, though very efficient, were not long or accompanied with much danger—although, I think, with some danger—to the parties performing them. They lasted between three and four hours: and there is no doubt whatever

(1) 3 Moo. P. C. 51; B. & L. 311.

that the lives of these people would have been irretrievably lost but for the exertions of these men.

I have already spoken with the praise which I think the plaintiffs deserve for their hastening to save human life and disregarding portions of the cargo which might have been valuable to them had they saved them; and I need not refer to that again. It has been said they have received 75*l.*; but, looking to the affidavit in answer to the defendants' interrogatories referred to, I think that sum must be considered as not having been paid by the cargo, but by the passengers, who were naturally prompted to give a reward out of their own pockets to those who had saved their lives.

There were four boats of the value I have described, and the number of men I have mentioned, and I think I shall make a fair award if I allot 500*l.* to all the boats in this case.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Waltons, Bubb, & Walton.*

[IN THE ARCHES COURT OF CANTERBURY.]

July 13.

THE OFFICE OF THE JUDGE PROMOTED BY PHILLIMORE *v.* MACHON.

Jurisdiction—Perjury—Surrogate—Marriage Licence—4 Geo. 4, c. 76, s. 14—20 & 21 Vict. c. 85—Criminal Jurisdiction over Laymen.

The Arches Court of Canterbury has no jurisdiction to entertain a suit by letters of request against a layman for falsely swearing before a surrogate to an affidavit to lead to the issue of a marriage licence.

THIS case was instituted in this Court by virtue of letters of request from the Chancellor of the Consistory Court of Lincoln, Walter Frank Phillimore, Esq.

The letters of request recited that Turner Machon, of the parish of St. Botolph, in the diocese of Lincoln, farmer, was charged with an offence against the laws ecclesiastical "by having on the 10th of February then last past, knowingly and falsely and fraudulently deposed in an affidavit to lead a licence for the solemnization of matrimony in the parish church of St. Botolph, in the city

1876

PHILLIMORE v. MACHON.

of Lincoln, sworn in the city of Lincoln before the Rev. J. M. Barret, clerk, a surrogate, of the vicar-general of the Bishop of Lincoln, and the official principal of the Consistory Court of the diocese of Lincoln, that one Mary Ann Dance, with whom he desired to contract matrimony, had her usual place of abode within the said parish of St. Botolph for the space of fifteen days then last past." The letters of request further recited the intention of the vicar-general and official principal aforesaid to begin a suit by promoting the office of the judge against the said Turner Machon for the offence above mentioned, and requested the Dean of Arches to issue a citation calling upon the said Turner Machon to appear and answer to certain articles touching and concerning his soul's health, &c., at the promotion of the said vicar-general and official principal aforesaid.

On the 18th of March last the Dean of Arches (the Right Honourable Lord Penzance) accepted the letters of request, and ordered a decree by letters of request to issue. (1)

On the 29th of March, the decree having been personally served, an appearance under protest was entered for Turner Machon, and on the 8th of April his proctor filed a petition in extension of his protest, and therein alleged in substance as follows:—

That the matter in question in the cause was not such as could be tried in an ecclesiastical Court, inasmuch as it appeared from the citation that it was intended to charge the defendant with having knowingly and fraudulently made a false affidavit, for the purpose of obtaining a licence for the marriage of himself with Mary Ann Dance.

That this must be taken to amount to a charge of an indictable offence, the cognizance whereof belongs to the temporal Courts, and not to the ecclesiastical Court.

That since the Act 20 & 21 Vict. c. 85, all jurisdiction in matrimonial matters, except so far as relates to the granting of licences, is vested in the temporal Courts, and therefore the alleged false oath relates to a subject which is not of ecclesiastical jurisdiction.

That the necessity of making affidavit as to the usual place of abode of one of the parties to be married arises entirely from the provisions of the Act 4 Geo. 4,

(1) On the motion to accept the letters of request, Jeune, on behalf of the promoter, referred to the case of *The Three Canons* cited in *Fell* v. *Bond*, 1 Rob. Ecc. 740, as shewing the practice of the ecclesiastical courts in causes of office where the judge promoted his own office.

c. 76, and the offence charged being an offence against that Act is punishable in the temporal Court only.

The proctor for the promoter brought in an answer, which in substance contained the following allegations:—

The granting of licences for the celebration of marriages and the administering an oath to persons desirous of obtaining the same is vested in the ecclesiastical Courts and the officers thereof by the Acts 4 Geo. 4, c. 76, and 20 & 21 Vict. c. 85, and otherwise.

The punishment of false and fraudulent swearing in causes and matters ecclesiastical is and always has been by the laws ecclesiastical within the cognizance and jurisdiction of the ecclesiastical Courts, and the charge against the defendant is for such false and fraudulent swearing.

Nothing in 4 Geo. 4, c. 76, and 20 & 21 Vict. c. 85, or either of them contained, deprives the ecclesiastical Courts of their jurisdiction to punish such false and fraudulent swearing as aforesaid.

The existence of a jurisdiction in the temporal Courts to punish false and fraudulent swearing in causes and matters ecclesiastical does not derogate from the jurisdiction of the ecclesiastical Courts in such causes.

May 11. *Benjamin Shaw,* on behalf of the defendant under protest, moved the Court to pronounce for the protest, and dismiss the proceedings for want of jurisdiction.—Whatever doubts may have existed in former times as to the competency of the ecclesiastical Courts to entertain cases where perjury has been committed in a spiritual cause (Phillimore, Ecclesiastical Law, vol. ii. p. 1084; *Bishop of St. David's* v. *Lucy* (1); *Rex* v. *Verelst* (2); Hawkins' Pleas of the Crown, bk. i. c. 29, s. 3, *Rex* v. *Foster* (3)), it is clear that a false oath taken before a surrogate for the purpose of procuring a marriage licence is now punishable only in the temporal courts, for by the 14th section of 4 Geo. 4, c. 76, the oath taken before the surrogate on the application for the licence is rendered obligatory, and as a consequence the offence with which the defendant under protest is charged is indictable as a common-law misdemeanor: *Reg.* v. *Chapman* (4), *Reg.* v. *Tomlinson* (5); *Reg.* v. *Hodgkiss.* (6) It therefore follows that, as there has been neither by that nor any subsequent statute any reservation in favour of the ecclesiastical Courts, any jurisdiction they might have once possessed in the present case is impliedly taken away:

(1) 1 Ld. Raym. 447, 451.
(2) 3 Camp. 432.
(3) R. & R. 459.
(4) 2 Car. & K. 846.
(5) Law Rep. 1 C. C. R. 49.
(6) Law Rep. 1 C. C. R. 212.

12 Jun 1876

1876

PHILLIMORE v. MACHON.

Co. Litt. 96 b. If this were not so, the defendant under protest besides being liable to examination and compellable to give evidence regarding a matter for which he was criminally responsible (*Bishop of Norwich* v. *Pearse* (1)), would be twice punishable for one and the same offence, as it would not be competent to him, after sentence against him in this Court, to plead autrefois convict to an indictment for the same offence. Not only, however, has the jurisdiction been taken away by 4 Geo. 4, c. 76, but 2 Geo. 2, c. 25, an Act for the more effectual preventing and further punishment of forgery, perjury, &c., contains no such reservation in favour of the ecclesiastical Courts as is to be found in 5 Eliz. c. 9.

It is true that the 11th section of that Act purports to reserve some jurisdiction to the spiritual Courts, but apart from the question whether those Courts could ever punish for false swearing in a non-contentious and temporal matter like the present, it may well be that the spiritual jurisdiction purported to be reserved really never existed: 3 Inst. p. 164; when the reservation would have no effect at all: Maxwell on the Interpretation of Statutes, p. 277; *Mayor of London* v. *Cox.* (2) No doubt traces can be found in the books of such jurisdiction having been exercised in former times, but the older authorities, as to whether such exercise of jurisdiction was legal, are utterly irreconcilable. There, moreover, is strong authority for holding that at the present day the ecclesiastical Courts no longer possess any criminal jurisdiction over the laity: *Burder* v. —— (3); *Free* v. *Burgoyne* (4); *Woods* v. *Woods* (5); *Burder* v. *O'Neill* (6); Hale's Precedents in Causes of Office, p. 39, No. 148.

Jeune and *C. F. Jemmett,* for the promoter. There is no doubt that from the passing of the statute Circumspectè Agatis, 13 Edw. 1, St. 1, jurisdiction has been lawfully exercised by the spiritual Courts in cases where the offence of perjury or false swearing was committed in a spiritual cause or matter: *Bishop of St. David's* v. *Lucy* (7); Phillimore, Ecclesiastical Law, vol. ii. p. 1085;

(1) Law Rep. 2 A. & E. 281.
(2) Law Rep. 2 H. L. 239.
(3) 3 Curt. 822.
(4) 2 Bli. (N.S.) 65.
(5) 2 Curt. 516.
(6) 9 Jurist (N.S.), 1109.
(7) 1 Ld. Raym. 451.

Oughton, Ordo Judiciorum (Law), p. 9, 16; Viner's Abridgment, p. 312; Gibson's Codex, p. 1013; 2 Inst. p. 492. Whatever may have been the extent of the jurisdiction expressly conferred on the spiritual Courts by that statute, it is clear that jurisdiction to punish pro salute animæ in a case like the present was included. For the false swearing alleged to have been committed by the defendant under protest was either committed in a spiritual cause or in a spiritual matter, and all the authorities are consistent in this respect, that no prohibition has been granted to the ecclesiastical Courts in cases where the perjury or false swearing was in a matter not temporal, and punishment was only sought pro salute animæ: Cosins, Apologie, &c., pt. 1, pp. 48–52: Reeves' History of the Common Law, vol. iv. p. 98. It has been objected that the offence committed here was a temporal offence, but the oath required to be taken before a surrogate preparatory to the issue of a marriage licence was made obligatory by ecclesiastical authority long before the passing of 4 Geo. 4, c. 76. The proceeding to obtain the grant of a marriage licence clearly becomes contentious directly a caveat is lodged: *Prince of Capua* v. *Ludolf;* Annual Register, 1836, p. 60. If the ecclesiastical Courts would have had jurisdiction over the present case in Queen Elizabeth's reign, concurrently either with the Star Chamber or the ordinary Courts of common law, what ground is there for holding that since that time the jurisdiction has been taken away? A jurisdiction conferred by statute, recognised by statute, cannot, it is submitted, be taken away except by the express words of a statute. When it was the intention of the legislature to take away from the ecclesiastical Courts all jurisdiction in testamentary and matrimonial causes, in causes of brawling and defamation, and to restrict their jurisdiction in causes of fornication, in each case an express enactment was passed. The observations in *Burder* v. —— (1) and *Free* v. *Burgoyne* (2), which the defendant under protest relies on as shewing that all criminal jurisdiction over the laity has now ceased, are merely obiter dicta. Again, it is objected that the defendant would be liable to be examined, but even then he would be in no worse position than a clerk accused under the Church Discipline Act. In matters below the degree of felony

(1) 3 Curt. 822. (2) 2 Bli. (N.S.) 65.

1876

PHILLIMORE v MACHON.

the ecclesiastical and temporal Courts may exercise concurrent jurisdiction: Stephen's Law of the Clergy, p. 1054. The statute of 2 Geo. 2, c. 25, relied on by the other side, does not affect the question, as that statute merely extended the penalties of perjury in the common law Courts.

It appears from Hale's Precedents of Causes of Office in the Diocese of London (1), that between 1475 and 1640 causes of perjury were frequently before the ecclesiastical Courts in London, and it is natural to expect that other instances would probably be found on investigation of the Court books of later date.

Shaw, in reply.

Cur. adv. vult.

July 13. LORD PENZANCE. This is a criminal suit promoted by the vicar-general of the Bishop of Lincoln against the defendant, charging him with falsely swearing, in an affidavit made for the purpose of obtaining a marriage licence, that Mary Dance, whom he was about to marry, had had her usual place of abode within a certain parish for the space of fifteen days then last past.

The suit has been commenced in this Court by letters of request. The defendant has appeared under protest, and his extended protest avers that the offence intended to be alleged against him is, if true, an indictable offence, the cognizance of which belongs to the temporal Courts.

The protest further alleges that, by the Divorce Act, 1857, (20 & 21 Vict. c. 85), all jurisdiction in matrimonial matters was transferred to the Divorce Court, and for these two reasons the defendant protests against the jurisdiction of this Court over the subject-matter of the suit, and prays that the suit may be dismissed. The transfer of the jurisdiction in matrimonial causes to the Divorce Court does not appear to me to have any bearing on the question, inasmuch as the granting of marriage licences is not touched or interfered with by that statute. These licences are granted by the same persons and under the same authority, since

(1) A series of precedents and pleadings in criminal causes . . . extracted from act books of ecclesiastical Courts in the diocese of London, by William Hale, Archdeacon of London. London, 1847.

the passing of that Act, as they were before it passed. And whatever authority this Court had before the Act, in respect to a false oath taken to obtain a licence, it appears to me that it still possesses.

But the argument of the case, a very elaborate and learned one, was in the main addressed to the other objections, namely, that the offence was an indictable one, and that as a consequence proceedings could not be maintained in this Court for its punishment. On the other side, it was contended that the power of punishing false swearing, pro salute animæ, had undoubtedly in old time resided in the ecclesiastical Courts, and that, as no statute had directly taken that power away, the Court was bound to assert and exercise it. Speaking generally, and setting aside for the moment all questions as to the clergy, it cannot, I think, be doubted that a recurrence to the punishment of the laity for the good of their souls by ecclesiastical Courts, would not be in harmony with modern ideas, or the position which ecclesiastical authority now occupies in the country. Nor do I think that the enforcement of such powers where they still exist, if they do exist, is likely to benefit the community.

These considerations form no reason for rejecting the jurisdiction if it exists in law, but they ought to make the Court careful in asserting such a jurisdiction if its existence is not plainly established, and it is no slight difficulty in the way of the promoter in this suit that he should not have been able to cite any instance of a similar suit having been entertained within the last two hundred years.

The attention of the Court has been drawn to a book published by Archdeacon Hale, containing entries extracted from the records of the Consistory Court of London, between A.D. 1475 and A.D. 1640, from which it plainly appears that false swearing and even the breaking of solemn promises was the subject of frequent proceedings in that Court. But the perusal of that book shews a great deal more; it shews that suits were entertained for a great variety of misconduct, which the warmest advocate of ecclesiastical censure would hardly seek to bring under that censure at the present day. For instance, I find suits entertained, amongst many other things, for "hiring foreigners to work at his art,

1876

PHILLIMORE v. MACHON.

contrary to his oath in admission to the liberty of London;" for "swearing," for "exercising games at unlawful times," for "breaking a promise to abide by an arbitration," and even for "the non-payment of a debt."

For some ecclesiastical offences it was argued, such as defamation, fornication, striking in church and brawling, the jurisdiction of this Court has been taken away by statute, but I am not aware of direct statutable authority rendering such matters as those to which I have just referred no longer the subject of ecclesiastical correction.

The question, therefore, arises how far may the argument be legitimately pushed, that whatever was once matter of ecclesiastical cognizance and correction remains so still, unless withdrawn by express enactment.

It will not be necessary, I think, to furnish a complete answer to this question in the present case, because, although no statute has expressly taken away all jurisdiction of this Court over matters of false swearing, the very statute under the provisions of which the alleged false oath in this case was taken has, in my opinion, by giving jurisdiction to the temporal Courts, inferentially withdrawn it from the Courts ecclesiastical.

It is a maxim of law, as well as a dictate of common sense and justice, that no man shall be twice punished for the same offence. If in the administration of the ordinary criminal law of this country a man is a second time indicted for the same offence, he can plead autrefois acquit or autrefois convict, as the case may be; but such a plea could not be established, if the present defendant were indicted in the temporal Court, by proof of the sentence or decree of an ecclesiastical Court against him. If, therefore, it is once established that the conduct of the defendant in taking the false oath imputed to him renders him liable to an indictment, he will obviously be liable to a second conviction and punishment by the temporal Court, in addition to his punishment here.

Now the case of *Reg.* v. *Chapman* (1), reserved by Lord Denman for the consideration of the judges, is a direct and positive authority for the proposition that a false oath, of a precisely similar character to that imputed in the present case, is punishable by

(1) 2 Car. & K. 846.

indictment. The statute, therefore, which ordered and required this oath to be taken, and thereby rendered punishable by indictment the taking of it falsely, must, I think, be considered by inference to have withdrawn all jurisdiction of this Court in the matter, if, notwithstanding its long disuser, it can be said to have existed.

In drawing this conclusion, I am justified by the high authority of Lord Coke. In Coke upon Littleton, p. 96, b, I find the following passage:—"And here is implied another maxim of the law, that where the common or statute law giveth remedy in foro seculari (whether the matter be temporal or spiritual), the conusans of that cause belongeth to the King's temporal Courts only; unless the jurisdiction of the ecclesiastical Court be saved or allowed by the same statute to proceed according to the ecclesiastical laws."

This view of the case makes it unnecessary, following the learned argument addressed to me, to inquire into the distinction between a false oath taken in ecclesiastical Courts and the like taken in temporal Courts; or the further distinction between oaths taken in a Court and oaths taken like the present before an officer or surrogate. I will only say that the authorities on these points appear to me not to be consistent with one another, and that, as far as I am able to perceive, there is no definite proposition on the subject capable of being supported by an uninterrupted stream of precedents.

For the simple reason stated, I hold that the Court has no jurisdiction in this matter, and I can only express my surprise that, with the ordinary criminal courts of this country open to him, for the prosecution and punishment of this offence, which cannot be regarded as otherwise than a grave one, any person should have thought it worth while to make this experiment for the revival of a jurisdiction which, if it has not expired, has so long slumbered in peace. I think the defendant under protest is entitled to costs.

Proctor for promoter: *Brooks.*

Proctors for defendant under protest: *Moore & Currey.*

REGULÆ GENERALES.

ADMIRALTY DIVISION.

THE judge having considered various applications in actions recently tried in this Division for the allowance of the fees set forth in the column headed "Higher Scale" in the schedule to Order VI. of the Additional Rules of Court, made and issued by Order in Council of the 12th of August, 1875, has directed that the fees on the higher scale are to be allowed as a general rule (always open to exception) as follows:—

In actions for salvage when 1000*l.* or upwards is awarded.

In actions for damage by collision to plaintiffs when 1000*l.* or upwards is recovered, exclusive of interest.

To defendants when 2000*l.* or upwards is claimed by plaintiffs.

But in any case in which the fees on the higher scale are sanctioned, the taxing officer is to exercise a discretion as to the extent to which those under the heads of appearances, instructions, perusals, and attendances are to be allowed.

(Signed) ROBERT PHILLIMORE.

April 3, 1876.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

INDEX.

ADMINISTRATION—Ad colligenda bona 424
See ADMINISTRATION AD COLLIGENDA BONA.
—— Creditor - - - - 427, 439
See ADMINISTRATION BY CREDITOR.
ADMINISTRATION DE BONIS NON.
—— Executor abroad - - - 435
See EXECUTOR ABROAD.

ADMINISTRATION AD COLLIGENDA BONA—*Power to dispose of Property by Sale.*] Where it is for the benefit of the absent or unknown next of kin the Court will direct an administrator ad colligenda bona to dispose of the property or of any portion of it by sale. IN THE GOODS OF SCHWERDTFEGER - - - - 424

ADMINISTRATION BOND—Assignment—Practice - - - - - - 422
See MOTION.

ADMINISTRATION BY CREDITOR—*Creditor preferred to next of Kin—20 & 21 Vict. c. 77, s. 73.*] Where the deceased, a paper manufacturer, was alleged to be insolvent at the time of his death, and his next of kin was a woman in a low position of life, and quite unfitted to carry on or wind up the business, the Court, under the provisions of 20 & 21 Vict. c. 77, s. 73, granted administration to a principal creditor, who applied for the same with the sanction of other creditors. IN THE GOODS OF FARRANDS - - - - 439

ADMINISTRATION DE BONIS NON—*Administration to Creditor — Assignment by Trustee of Bankrupt—Administration of Debt due from Intestate's Estate—Limited Grant de bonis non to such Assignee—24 & 25 Vict. c. 134, s. 137—32 & 33 Vict. c. 71, s. 111.*] A creditor having obtained administration of the estate of an intestate, died without having fully administered, and leaving the debt due to him still unsatisfied. The creditor was a bankrupt at the time of his death, and after his death his trustee in bankruptcy assigned the unsatisfied debt due to his estate from the intestate's estate to one of his creditors. The

ADMINISTRATION DE BONIS NON—*continued.* Court made a grant of administration de bonis non to such assignee, limited to the interest in the intestate's estate which had been assigned to him. IN THE GOODS OF BURDETT - - - 427

ADMIRALTY ACTION—Default of appearance
See WRIT SPECIALLY INDORSED. [121

ADMIRALTY JURISDICTION—Ship necessaries
See NECESSARIES FOR SHIP. [C. A. 253

APPEAL—County Court—Admiralty - 52
See COUNTY COURT APPEAL.
—— Question of fact—Oral evidence C. A. 283
See APPEAL ON FACTS.
—— Rehearing—Practice - - C. A. 154
See LOST WILL.
—— Security for costs - - C. A. 280
See SECURITY FOR COSTS.
—— Stay of proceedings - - C. A. 316
See BOOK OF COMMON PRAYER. 1.
STAYING PROCEEDINGS.

APPEAL ON FACTS—*Appeal—Reversal—Evidence—Collision—Look-out—Negligence.*] Where the judge of the Court below has come to a conclusion of fact after hearing witnesses, the Court of Appeal will not, except in cases of extreme pressure, reverse his decision; but where the decision of the Court below does not depend upon the credibility of the witnesses, but on the inferences from the evidence drawn by the judge, his decision may, even without such pressure, be reversed by the Court of Appeal.—A steamer, with sails up, running through a roadstead ought even by day-time and in fine weather to have a man on the look-out besides the captain on the bridge. THE GLANNIBANTA - - C. A. 283

ARCHES COURT—Jurisdiction—Perjury - 481
See PERJURY.

ATTACHMENT—*Refusal to produce a Will—Attachment—Order XLIV., s. 2—Practice.*] A person served with a subpœna under 20 & 21 Vict. c. 77,

ATTACHMENT—*continued.*
s. 26. to bring in a testamentary paper, failed to comply with it. On a motion for an attachment against him, it was held that, in accordance with Order XLIV., s. 2 (Judicature Acts, 1873, 1875), the party proceeded against must receive notice of the application in the first instance. BAIGENT *v.* BAIGENT - - - - - 421

ATTESTATION—Will—Execution - - 70
See EXECUTION OF WILL. 1, 2.

BILL OF LADING—Weight and contents unknown —Burden of proof - - -
See DESCRIPTION OF GOODS SHIPPED.

BOOK OF COMMON PRAYER—*Public Worship Act*, 1874 (37 & 38 *Vict. c.* 85)—*Administration of the Communion to less than three Persons—Crucifix —Stations of the Cross and Passion—Practice—Stay of Proceedings pending Appeal.*] In a proceeding under the Public Worship Regulation Act, 1874, it was proved that the respondent, the incumbent of a parish church, had at the celebration of the Holy Communion consecrated and received the elements when only one person communicated with him. It was also proved that a like infringement of the rubric had taken place on several previous occasions during his incumbency, and that no steps had been taken by him to prevent its recurrence:—*Held*, that the respondent must be admonished to obey the rubric. In the church of which the respondent was the incumbent there was set up and retained under his directions, upon the top of a screen of open ironwork at the entrance of the chancel, a crucifix of metal, in full relief and about eighteen inches long. The crucifix, which stood on the highest portion of the centre of the screen, was turned towards the congregation. Along the top of the screen was a row of candles coming close up to the crucifix on either side. These candles were lighted at evening service:—*Held*, that the crucifix so surmounting the screen, not being an architectural decoration, but being in danger of being an object of superstitious reverence, must be removed as unlawful: *Semble*, that the set of delineations used in Roman Catholic churches, and commonly called "Stations of the Cross and Passion," are decorations forbidden by law in churches of the Church of England. In cases under the Public Worship Regulation Act, 1874, where questions of law and fact are involved, the Court will hear two counsel on each side, and one counsel in reply.—Principles in accordance with which the discretion of the Court in ordering a stay of proceedings during the pendency of an appeal, under the 9th section of the Public Worship Regulation Act, 1874, will be exercised in the Arches Court of Canterbury. CLIFTON *v.* RIDSDALE - - - - - 316

2. —— *Refusal to administer the Holy Communion—"Lawful Cause" of Refusal—1 Edw. 6, c. 1, s. 8—27th Canon—Church Discipline Act, 3 & 4 Vict. c. 86.*] In a suit under the Church Discipline Act against the respondent, for having, on the 4th of October, 1874, repelled from the Holy Communion, without lawful cause, the appellant, a parishioner, who had presented himself after due notice, the respondent answered that he did so for and on account of the writing and publishing by the appellant, of certain letters addressed to the respondent, and of his causing to be printed and published a certain volume of Selections from the Old and New Testaments, and for no other cause or reason whatever. It appeared that one of the letters protested against the irreligious tendency of a sermon (not produced) which had been preached by the respondent, and that another of the letters (a private and solicited communication) explained that the construction which he, the appellant, placed upon certain parts of the Bible, not being the same as the construction which, in his opinion, was generally placed thereon, he omitted such parts from the said volume and from his family reading. It further appeared that the appellant had published a book of family prayers, compiled entirely from the Liturgy of the Church of England, and that he had stated that he valued the Book of Common Prayer as "only second to the Bible itself." It further appeared that the appellant was of irreproachable moral character:—*Held*, that no lawful cause of repulsion had been shewn; that the appellant was not "an open and notorious evil liver" within the meaning of the rubric; neither was he a "common and notorious depraver of the Book of Common Prayer" within the meaning of the 27th Canon.—The primâ facie right of a parishioner to partake of the Holy Communion having been (though probably independent of statute) distinctly declared by 1 Edw. 6, c. 1, s. 8, subject to the minister's denial of the same for lawful cause, *Quære*, whether the canons could of their own authority prescribe "causes" which would be sufficient or "lawful" within the meaning of the statute.—*Quære*, whether opinions (erroneously on the evidence attributed to the appellant by the Court below) in denial of the existence and personality of the devil, and of eternal or other punishment for sin in a future state, can be entertained or expressed by a member of the Church, whether layman or clergyman, consistently with the law and with his remaining in communion with the church. JENKINS *v.* COOK - - - - - P. C. 80

3. —— *Moveable Cross—Retable.*] A moveable wooden cross, without the sanction of a faculty or the concurrence of the appellant, the parishioners' churchwarden, but with the concurrence of the vicar's churchwarden, was by the vicar's authority placed on a retable or wooden ledge at the back of and immediately above the communion table in a parish church, with the intention that it should remain there permanently. Two days afterwards the cross was removed by the appellant, as churchwarden, without the authority of a faculty, from the retable, and taken by him out of the church, and retained by him. In a criminal suit promoted by the vicar in the Court of Arches against the appellant for having removed the same:—*Held*, that the cross, in the position which it occupied while in the church, is forbidden by law; but as both parties were in the wrong in having acted without a faculty, the suit was dismissed without costs.—*Liddell* v. *Westerton* (Moore's Special Rep.); *Liddell* v. *Beal* (14 Moo. P. C. 1) explained and followed. DURST *v.* MASTERS - - - 123, P. C. 373

BOTTOMRY BOND — *Collision — Liability of Master—Disbursements*—24 *Vict. c.* 10, *s.* 10.] The master of a vessel which, by his default, had been

BOTTOMRY BOND—*continued.*
in collision with another vessel in a foreign port, gave a bond for payment of the damages, and so released the vessel:—*Held* (in an action for wages and disbursements brought by the master), that as against the mortgagees of the vessel the amount of the penalty of the bond would not be retained in Court to meet any claim which might be established against the master under his bond. The Limerick - - C. A. 292

BURDEN OF PROOF—Damage to goods shipped
See Description of Goods shipped. [414

CARRIER—Damage to goods shipped—Burden of proof - - - - 414
See Description of Goods shipped.

—— Damages—Loss of market - - 452
See Damages against Carrier.

CASES—*Brown* v. *Brown* (8 E. & B. 876) followed) - - - C. A. 154
See Lost Will.

—— *Burch* v. *Reid* (Law Rep. 4 A. & E. 112) followed - - - - 302
See Proctor.

—— *Liddell* v. *Beal* (14 Moo. P. C. 17) explained and followed - 123, P. C. 373
See Book of Common Prayer. 3.

—— *Liddell* v. *Westerton* (Moore's Report) explained and followed 123, P. C. 373
See Book of Common Prayer. 3.

—— *Quick* v. *Quick* (3 Sw. & Tr. 442) overruled - - - - C. A. 154
See Lost Will.

—— *The Onni*, (Lush. Adm. 154) followed
See Necessaries for Ship. [C. A. 253

—— *The Wataga*, (Sw. Adm. 165) followed
See Necessaries for Ship. [C. A. 253

CHURCH ORGAN—Control of incumbent 130
See Organ.

CHURCHYARD—*Faculty—Churchyard closed for Burials under Order in Council—Public Garden—Discretion of the Court in Faculty Cases*] On an application for a faculty to sanction the appropriation of a portion of a churchyard, which had been closed for burials under an Order in Council, for the purpose of a public garden, the Court authorized the construction of footpaths in such portion of the churchyard for the convenience of the parishioners, and the erection of gates to give them access to it. *In re* The Rector and Churchwardens of St. George-in-the-East [311

—— Tombstone—Inscription - - 73
See Tombstone.

CITATION—Heir-at-law—Testamentary suit 148
See Citation of Heir at Law.

CITATION OF HEIR AT LAW—*Testamentary Suit—Citation to see Proceedings—Heir-at-Law and Devisees of Real Estate—20 & 21 Vict. c. 77, s. 61—Judicature Acts, 1873-1875, Order XVI., Rules 12, 13.*] The practice as to citations to see proceedings heretofore in use in the Probate Court has not been altered by the Judicature Acts and the rules therein contained; and therefore in order that a decree in a testamentary suit may bind the heir at law or devisees of real estate, a citation should be taken out against them under

CITATION OF HEIR AT LAW—*continued.*
the provisions of 20 & 21 Vict. c. 77, s. 61, notwithstanding the directions of the 13th Rule, Order XVI., Judicature Acts, 1873-1875. Kennaway *v.* Kennaway - - - 148

COLLISION—Bond for damages - C. A. 292
See Bottomry Bond.

—— Damages—Loss of market - - 466
See Damages for Collision.

—— Negligence—Stern lights - C. A. 276
See Evidence of Negligence. 2.

COMPULSORY PILOTAGE — *Damage — Trinity Outport—17 & 18 Vict. c. 104, s. 370—Costs.*] Pilotage is compulsory within the Falmouth district. The Juno - - - - 135

CONTRIBUTORY NEGLIGENCE—Ship C. A. 117
See Evidence of Negligence. 1.

COSTS—Appeal—Security - - C. A. 280
See Security for Costs.

—— Divorce—Death of petitioner after decree
See Costs in Divorce Suit. [137

COSTS IN DIVORCE SUIT—*Matrimonial Suit—Death of Petitioner—Taxation of Costs—33 & 34 Vict. c. 28.*] After a decree absolute had been made for a dissolution of his marriage with the respondent, together with an order for costs against the co-respondent, but before such costs had been taxed, the petitioner died:—*Held*, that his representative was entitled under the provisions of the statute 33 & 34 Vict. c. 28, s. 19, to enforce such order for costs against the co-respondent. Hawks *v.* Hawks - - - - - 137

COUNTY COURT—Appeal—Admiralty - 52
See County Court Appeal.

COUNTY COURT APPEAL — *Practice — Appeal from County Court—31 & 32 Vict. c. 71, s. 27—Supreme Court of Judicature Act, 1873, ss. 34, 42.*] The 27th section of the County Courts Admiralty Jurisdiction Act, 1868, provides that the judge of the High Court of Admiralty may, on sufficient cause being shewn to his satisfaction, allow an appeal from a final decree or order of a county court in an Admiralty cause to be prosecuted, notwithstanding that the instrument of appeal has not been lodged in the Registry of the High Court of Admiralty within ten days from the date of the decree or order appealed from:—*Held*, that an application for leave to appeal under this section was rightly made to the judge of the High Court of Admiralty sitting as a judge of the High Court of Justice. The Two Brothers - 52

CREDITOR—Administration - 427, 439
See Administration by Creditor.
Administration de bonis non.

CROSS—Church - - - P. C. 373
See Book of Common Prayer. 3.

CRUCIFIX—Church - - - - 316
See Book of Common Prayer. 1.

DAMAGES—Carrier—Loss of market - 452
See Damages against Carrier.

—— Collision—Loss of charterparty - 466
See Damages for Collision.

DAMAGES AGAINST CARRIER — *Damage to Cargo—Measure of Damage—Loss of Market.*] An

DAMAGES AGAINST CARRIER—*continued.*
action under s. 6 of the Admiralty Court Act, 1861 (24 Vict. c. 10), was instituted on behalf of the assignee of a cargo of hemp and other goods against a British ship, to recover damages resulting from alleged unreasonable delay in the carriage of the goods. The owner of the ship admitted his liability, and the amount of damage was referred to the registrar, assisted with merchants, to report upon. The registrar found that there had been a fall in the market value of hemp between the date when the ship ought to have delivered her cargo and the date when the delivery actually took place, and reported that the plaintiff was entitled to 5 per cent. interest on the invoice value of the hemp during the period of delay, and was not entitled to further compensation in respect of the delay in the delivery of the hemp:—*Held*, on appeal, that the registrar ought to have included in the damages the difference between the market price of the cargo at the time when it was delivered and at the time when it ought to have been delivered. The Parana - - - 452

DAMAGES FOR COLLISION—*Collision—Measure of Damage—Loss of Charterparty.*] A barque, lying in the Madras Roads, was chartered to proceed to the Coromandel coast, and there load a cargo for London, at a freight of 55*s.* per ton. When about to proceed to her loading port, she was run into and seriously damaged by a ship whose owners admitted their liability for the collision. At a reference before the registrar, assisted by merchants, to assess the damages, it was proved that, owing to the barque having been delayed at Madras for repairs, rendered necessary by the collision, the charterers had acquired a right to cancel the charterparty, and that they had cancelled the charterparty; afterwards, when the repairs were completed, the barque being unable to procure more profitable employment, sailed from Madras for London with cargo, at a freight of 45*s.* per ton. The registrar disallowed a claim made by the plaintiffs in respect of the loss of the charterparty so cancelled, and the plaintiffs appealed to the Court:—*Held*, that the case must be again referred to the registrar, with directions to include in the amount of damages a sum in respect of the loss of the charterparty. The Star of India - 466

DECREE ABSOLUTE—Application of guilty party
See Decree Nisi. [56

—— Divorce—Death of petitioner - - 137
See Costs in Divorce Suit.

DECREE NISI—*Suit for Dissolution of Marriage—Application to make the Decree absolute on behalf of Respondent—Right to have Petition dismissed for Non-prosecution.*] A petition having been presented for a dissolution of marriage on the ground of the adultery of the wife, and a decree nisi made thereon, the petitioner failed to apply to the Court within reasonable time to have such decree made absolute. On an application to that effect on behalf of the respondent:—*Held*, that the power of the Court in dissolving marriages can only be exercised on the application of an innocent party.—As the application for a decree absolute is a material step in the cause, if the petitioner fails to take it within reasonable time, it would seem that the respondent may call upon him to do so or shew cause why the decree nisi should not be revoked and the petition be dismissed for want of prosecution. Ousey *v.* Ousey - - 56

DEFAULT OF APPEARANCE—Admiralty action
See Writ specially indorsed. [121

DEFAULT OF PROSECUTION—Divorce—Decree
See Decree Nisi. [56

DESCRIPTION OF GOODS SHIPPED—*Damage to Cargo—Onus of Proof—Bill of Lading—Weight, Contents, and Value Unknown.*] The master of a Russian ship received on board his vessel at St. Petersburg certain goods under bills of lading in the ordinary form:—"Shipped in good order and condition, &c., to be delivered in the like good order and condition at the port of London." Certain excepted perils were enumerated in the bills of lading, and in the margin thereof were the words, "Weight, contents, and value unknown." The ship arrived at London, and the goods were delivered to the consignees, but a great number of them were found to be in a damaged state. At the hearing of a cause under the 6th section of the Admiralty Court Act, 1861, instituted on behalf of the consignees against the ship, it was proved that the damaged goods were, when taken out of the ship, in an unmerchantable state, and damaged both externally and internally, and that the damage was recent, and not traceable to any inherent vice in the goods:—*Held*, that, in the absence of any satisfactory proof on the part of the shipowners that the goods were in bad condition when shipped, it was not incumbent on the plaintiffs, in order to establish their case, to prove where or how the goods became damaged:—*Held*, that the bills of lading afforded evidence that externally, and so far as met the eye, the goods had been shipped in good order and condition. The Peter der Grosse (6972) - - - - 414

DISBURSEMENTS — Master of ship — Bond for damages - - - C. A. 292
See Bottomry Bond.

DIVORCE—Alteration of settlement 442, 447
See Settlement by Divorce Court. 1, 2.

—— Decree—Death of petitioner - - 137
See Costs in Divorce Suit.

—— Decree nisi—Guilty party—Decree absolute
See Decree Nisi. [56

DOMICIL — *Matrimonial Suit — Jurisdiction — Domicil of Wife deserted by her Husband—No Domicil, either real or acquired, of the Respondent in this Country.*] A woman, having been deserted by her husband, who went to reside in the United States of America, acquired a bonâ fide domicil in England, and instituted a suit for dissolution of marriage against him by reason of his adultery and desertion. The original place of domicil of marriage and of matrimonial cohabitation of the parties was in Jersey, and the adultery proved was committed there. The husband had never had or acquired a domicil in England:—*Held*, that even if the petitioner, without a sentence of judicial separation, could acquire a distinct domicil in this country, she could not make her husband amenable to the lex fori of her new domicil. Le Sueur *v.* Le Sueur - - - 139

2. —— *Will of naturalized British Subject—Will made in England according to English Law—Foreign Domicil at Time of Death*—24 & 25

DOMICIL—*continued.*

Vict. c. 114, *s.* 2.] A naturalized British subject, whilst domiciled in England, made a will according to the forms required by the law of England. At the time of his death he was domiciled in Italy. His will was admitted to probate under 24 & 25 Vict. c. 114, s. 2. In the Goods of Gally - - - - - - - 438

EVIDENCE—Foreign law - - - 69
See Foreign Law 2.

—— Lost will - - - - C. A. 154
See Lost Will.

EVIDENCE OF NEGLIGENCE—*Collision—Improper Navigation—Third Ship—Contributory Negligence.*] Where one ship is by the improper navigation of a second ship compelled to alter her course, and so does damage to a third ship, the ship which compelled the alteration of course is liable for the damage; and that liability remains if the damaged ship was not actually negligent, even though by taking another course she might have avoided the collision. The Sisters 117

2. —— *Collision—Speed—Ship astern—Light.*] In a case of collision a steamer will be held not justified in running at full speed on a dark night and not far from a coast where other vessels are likely to be.—A vessel, unless there be apparent danger, is not guilty of negligence in not shewing a light to a vessel following her. The City of Brooklyn - - - - C. A. 276

EXECUTION OF WILL—*Execution—Signature in Attestation Clause*—15 *Vict. c.* 24.] The deceased with his own hand wrote out a will, which concluded with an attestation clause "signed, published, and declared by the said A. B., the testator, as and for his last will and testament, &c." At the time of execution the deceased declared the paper to be his will in the presence of two witnesses, and asked them to witness it, which they did, but he did not himself sign it in their presence, nor was there any direct evidence that the witnesses saw the signature. The only signature of the deceased was in the attestation clause:—*Held*, that, under 15 Vict. c. 24, the execution was valid. In the Goods of Pearn 70

2. —— *Codicil attached to Will—Subscription and Attestation of Witnesses to Codicil on Back of Will.*] The witnesses to the execution of a codicil signed their names on the back of a will, to which that codicil was attached by a pin. There was evidence which satisfied the Court that the will and codicil were pinned together at the time of the execution of the codicil, and that the witnesses intended by their subscription on the back of the will to attest the signature of the testatrix at the foot of the codicil:—*Held*, that the codicil was entitled to probate. In the Goods of Braddock - - - - - -

EXECUTOR ABROAD—*Will*—38 *Geo.* 3, *c.* 87, *s.* 1—21 & 22 *Vict. c.* 95, *s.* 18—*An Executor's Executor out of the Jurisdiction.*] An executor's executor is affected by the provisions of the statutes 38 Geo. 3, c. 87, s. 1, and 21 & 22 Vict. c. 95, s. 18, so that if he reside out of the jurisdiction of the Court of Probate at the expiration of twelve calendar months from the death of his testator, the Court may grant administration with the will annexed of the estate of the original deceased to

EXECUTOR ABROAD—*continued.*

a creditor, next of kin, or legatee, limited to institute a suit in the Court of Chancery, or to receive a specific fund. In the Goods of Grant - 435

FACULTY—Discretion—Churchyard - 311
See Churchyard.

FOREIGN JUDGMENT—*Damage—Foreign Judgments by Default—Default for Want of Appearance—Default in Pleading.*] The owners of the ship *D.* instituted proceedings in a foreign Court against the owner of the ship *E.* in respect of a collision between the two ships. The owner of the *E.* instituted a cause of damage in this country in respect of the same collision against the ship *D.* The owner of the *E.* neglected to enter an appearance in the foreign Court, but instituted a cross cause in the foreign Court against the owners of the *D.* In both suits in the foreign Court the owners of the *D.* obtained judgment by reason of the defaults of the owner of the *E.* The owners of the *D.*, having appeared in the cause instituted in this country, pleaded the foreign judgments in bar. The Court in this country, having decided on the merits in favour of the owner of the *E.*, refused to give effect to the defence of res judicata. The Delta. The Erminia Foscolo - - - - - - 393

FOREIGN LAW—*Foreign Soil—English Ship—Damage—Commission to take Evidence.*] An English company possessed of a pier in a port in Spain instituted a cause of damage against an English ship for negligently injuring the pier. The shipowners by their answer pleaded that by the law of Spain the master and mariners of a ship, and not the owners, were liable for negligent navigation:—*Held*, reversing the decision of the judge of the Admiralty Division, that the case was governed by the law of Spain, and that that part of their answer ought not to be struck out.—Commission to take evidence in Spain as to the law of Spain refused. The M. Moxham [43, C. A. 107

2. —— *Evidence.*] The evidence of a person whose only knowledge of the laws of a foreign country is derived from having studied them cannot be received in proof of the operation or effect of such laws. In the Goods of Bonelli - 69

FOREIGN WILL—*Testamentary Papers—General American Will—Special Will relating to British Funds—Separate Executors—Incorporation.*] An American, by a will and codicils, disposed of his property generally, and by a second will, in which he named separate executors, of moneys he had invested in the British funds. He expressed a distinct wish that the British will should take effect as a separate testamentary disposition of property independent of and disconnected from his general will:—*Held*, that it was unnecessary to incorporate the American will, which was very bulky, in the English probate, but that an authenticated copy of the American will and codicils should be filed in the registry, and a note be added to the English probate to the effect that such copy had been so filed. In the Goods of Astor - - - - - - 150

HOLY COMMUNION—Administration to less than three - - - - - 316
See Book of Common Prayer. 1.

HOLY COMMUNION—*continued.*
—— Refusal—Lawful excuse - **P. C. 80**
See Book of Common Prayer. 2.
HUSBAND AND WIFE—Desertion—Domicil of wife - - - - - **139**
See Domicil. 1.

IMPOTENCE—Nullity—Delay - - **405**
See Nullity of Marriage.
INJUNCTION—*Probate Suit—Property of the Deceased, Shares in Shipping—Power of the Court to prohibit dealing in such Shares*—17 & 18 *Vict. c.* 104, *s.* 65; 36 & 37 *Vict. c.* 66, *s.* 16.] The Court of Probate, as a division of the High Court of Justice, has vested in it the jurisdiction formerly exercised by the High Court of Chancery, and therefore may, under the 65th section of 17 & 18 Vict. c. 104, direct an order to issue prohibiting the dealing in any share of a ship for a time and on conditions to be named therein, and the registrar of shipping, on being served with such order or an official copy thereof, must obey the same. Nicholas *v.* Dracachis - - - **72**
INTERVENTION—*Matrimonial Suit—Decree Nisi—Queen's Proctor—No Charge of Collusion—Practice.*] If information be given to the Queen's Proctor of material facts necessary to the due decision of a case before the Court during the progress of the cause, he cannot at that time take any steps except to watch the case and see whether such material facts are brought to the notice of the Court. If not, he will be entitled, as one of the public, but acting under the direction of the Attorney General, to shew cause against the decree being made absolute, in which case he will follow the ordinary practice prescribed by the rules. It is only when he has evidence of collusion that it is necessary that he should apply to the Court for leave to intervene under the latter part of the 7th section of the statute 23 & 24 Vict. c. 144. Hudson *v.* Hudson - - - **65**
JUDICATURE ACT, 1873, s. 16 - - **72**
See Injunction.
—— **ss. 19, 22, 49** - - - **C. A. 154**
See Lost Will.
—— **ss. 34, 42** - - - - - **52**
See County Court Appeal.
JUDICATURE ACT, 1875, s. 18 - **C. A. 154**
See Lost Will.
JURISDICTION—Arches Court—Perjury - **481**
See Perjury.
—— Divorce—Domicil - - - **139**
See Domicil. 1.
—— Ship—Necessaries - - **C. A. 253**
See Necessaries for Ship.
"LAWFUL CAUSE" - - - **P. C. 80**
See Book of Common Prayer. 2.
LIGHT—Ship—Negligence—Stern-light **C. A. 276**
See Evidence of Negligence.
LIMITATION OF LIABILITY — *Practice.*] A vessel which had been arrested in a cause of damage was released on payment into Court of the amount to which the liability of her owners was limited by statute, together with a sum to cover interest and costs. Subsequently the vessel was pronounced solely to blame for the collision, and her owners, who had instituted a cause of limitation of liability, moved the Court to decree for a limitation of their liability, and to order that the sum in Court should be transferred to the credit of the limitation of liability suit.—The Court decreed a limitation of liability, but considered it unnecessary to order that the amount in Court should be transferred to the credit of the limitation of liability suit. The Sisters - **281**
LIS ALIBI PENDENS—*Damage—Court of Admiralty of Ireland—Stay of Proceedings—Dismissal of Action.*] A collision occurred on the high seas between two vessels, the *H. W.* and the *C. C.*, and to recover for the damage sustained therein the owner of the *H. W.* instituted a cause of damage in rem in the High Court of Admiralty of Ireland against the *C. C.*, and caused her to be arrested in Ireland. The owners of the *C. C.* obtained the release of the vessel on bail, and instituted a cross suit against the *H. W.* Subsequently the *C. C.* came to England, and was there arrested in an Admiralty action in rem at the suit of the owner of the *H. W.*, who claimed in such action to recover damages in respect of the same collision. Whilst the proceedings in Ireland were still pending, the owners of the *C. C.* applied that the action in this Court should be dismissed with costs:—The Court ordered the vessel to be released, and all proceedings in the action to be stayed. The Catterina Chiazzare - **368**
LOST WILL—*Probate—Presumption of Revocation—Secondary Evidence of Contents—Interested Witness—Declarations of Testator—Contents of Will not completely proved—Hearing of Cause by Judge of Probate Division without a Jury—Rehearing—Appeal*—20 & 21 *Vict. c.* 77, *ss.* 35, 39, 61, 62, 63—*Probate Court Orders of July*, 1862, *Rules* 47, 49, 52, 59, 60—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 22, 49—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 18—*Rules of Supreme Court, Order XXXIX., Rule* 1; *Order LVIII., Rules* 2, 14.] The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence.—*Brown* v. *Brown* (8 E. & B. 876) approved and followed.—Declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents (Mellish, L.J., dissenting as to declarations made after the execution of the will).—*Quick* v. *Quick* (3 Sw. & Tr. 442) overruled.—The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached.—When the contents of a lost will are not completely proved probate will be granted to the extent to which they are proved.—When a cause in the Probate Division has been heard before a judge without a jury, the evidence being given vivâ voce, the parties may, if they please, apply for a re-hearing under Rule 60 of the Probate Court Orders of July, 1862, or they may, without doing so, appeal from the decision of the judge, on the facts as well as the law, to the Court of Appeal. Sugden *v.* Lord St. Leonards **C. A. 154**
MARRIAGE—Revocation of will - - **431**
See Revocation of Will. 1, 2.
MARRIAGE LICENCE—Perjury - - **481**
See Perjury.

MARRIAGE SETTLEMENT — Divorce — Alteration by Court - - 442, 447
See Settlement by Divorce Court. 1, 2.

MASTER OF SHIP — Disbursement — Bond for damages - - - C. A. 292
See Bottomry Bond.

MEASURE OF DAMAGES — Carrier — Loss of market - - - - 452
See Damages against Carrier.

—— Collision—Loss of charterparty - 466
See Damages for Collision.

MERCHANT SHIPPING ACT, 1854, s. 484
See Salvage. 1. [C. A. 260

MOTION —*Administration Bond — Assignment — Rule Nisi—Judicature Act*, 1873, *Order LIII., Rules* 2, 3—*Practice.*] An application made to assign an administration bond in order to its being sued upon, is not one made in an action, and consequently Order LIII., Rules 2, 3, is not applicable to it, and the old practice will still prevail that there shall be a rule nisi in the first instance, calling upon the sureties to shew cause why the bond should not be assigned. In the Goods of Mary Cartwright - - - - 422

NECESSARIES FOR SHIP—3 *&* 4 *Vict. c.* 65, *s.* 6 — *Money advanced for Disbursements of foreign Ship in British Colonial Port—Personal Credit—Practice.*] The master of a foreign vessel lying in the port of Quebec, being without funds or credit, by means of a bill of exchange drawn upon a firm of shipbrokers in London, procured the advance of a sum of money for necessaries for the ship. The bill of exchange was accepted and paid, but the acceptors, not having received the amount of the bill from the shipowners, instituted an action against the ship for the amount of the bill:—*Held*, that the Court had jurisdiction to entertain the action.—*The Wataga* (Sw. Adm. 165) and *The Onni* (Lush. Adm. 154) followed. The Anna - - - - - - C. A. 253

NEGLIGENCE—Contributory negligence C. A. [117
See Evidence of Negligence.

NULLITY OF MARRIAGE—*Impotence—Delay—Insincerity of Complaint.*] In August, 1875, a wife, then aged 47, instituted a suit for a declaration of the nullity of a marriage contracted in May, 1849. There was evidence that the petitioner was virgo intacta, and that the respondent was incurably impotent. The petition was dismissed, the Court being of opinion that there was no satisfactory explanation of the delay in taking proceedings, and that the proceedings had been taken partly in consequence of the disagreements and quarrels between the petitioner and the respondent, and not with the single object of obtaining redress for the injury done to the petitioner by the respondent's incapacity. W., falsely called R. *v.* R. - - - - - 405

ONUS PROBANDI—Damage to goods shipped [414
See Description of Goods shipped.

ORGAN—*Pleading—Control of the Incumbent of a Parish over Organ.*] The organist of a parish church, although appointed and paid by the vestry, is guilty of an ecclesiastical offence if he plays on the organ immediately before, or during, or immediately after divine service, contrary to the directions of the incumbent.—In a criminal suit promoted by the vicar of a parish against the organist of his parish church for playing on the organ of the church contrary to the directions of the vicar, the defendant filed a responsive plea, in which it was alleged that by the ecclesiastical law the incumbent of a parish had not an unlimited right to control the use of the organ, or to put a stop to the ordinary musical services of the church, in an arbitrary manner, without reasonable or proper cause, or the sanction of the ordinary, and that the promoter, in prohibiting the defendant from playing on the organ, had acted without such sanction, and without reasonable or proper cause. The responsive plea further alleged in effect that the defendant had been appointed organist, and was paid a salary by the vestry, and that the majority of the parishioners were anxious that the customary performance on the organ should continue.—On application on behalf of the promoter, the Court rejected the responsive plea as inadmissible. Wyndham *v.* Cole [130

ORNAMENTS—Church - - - 316
See Book of Common Prayer. 1.

PARISH—Organ—Control of incumbent - 130
See Organ.

PERJURY —*Jurisdiction — Surrogate — Marriage Licence*—4 *Geo.* 4, *c.* 76, *s.* 14—20 *&* 21 *Vict. c.* 85—*Criminal Jurisdiction over Laymen.*] The Arches Court of Canterbury has no jurisdiction to entertain a suit by letters of request against a layman for falsely swearing before a surrogate to an affidavit to lead to the issue of a marriage licence. Phillimore *v.* Machon - - - 481

PRACTICE—Appeal—Stay of proceedings C. A. [316
See Book of Common Prayer. 1.
Staying Proceedings.

—— Attachment—Notice - - - 421
See Attachment.

—— Commission—Foreign law - 43, C. A. 107
See Foreign Law. 1.

—— Divorce—Decree absolute—Death of petitioner - - - - 137
See Costs in Divorce Suit.

—— Divorce—Decree absolute—Guilty party 56
See Decree Nisi.

—— Intervention—Queen's Proctor - 65
See Intervention.

—— Limitation of liability - - - 281
See Limitation of Liability.

—— Motion—Rule nisi - - - 422
See Motion.

—— Service out of the jurisdiction 300, 426
See Service out of the Jurisdiction. 1, 2.

—— Stay of proceedings—Lis alibi pendens 368
See Lis alibi pendens.

—— Substituted service - - - 423
See Substituted Service.

—— Testamentary suit—Citation - - 148
See Citation of Heir at Law.

PRACTICE—*continued.*
—— Writ specially indorsed—Action in rem 121
See Writ specially indorsed.

PROBATE—Foreign will - - - 150
See Foreign Will.

—— Lost will—Evidence - - C. A. 154
See Lost Will.

PROBATE COURT ORDER, July, 1862, rr. 47, 49, 52, 59, 60 - - - C. A. 154
See Lost Will.

PROBATE SUIT—Shares in ship—Injunction 72
See Injunction.

PROCTOR — *Practice — Proctor—Solicitor of the Supreme Court*—36 & 37 *Vict. c.* 66, *s.* 87.] A respondent in the cause of appeal in the Arches Court cannot appear by a solicitor of the Supreme Court of Judicature who is not also a proctor of the Arches duly qualified and admitted according to the ancient practice of that Court.—*Burch* v. *Reid* (Law Rep. 4 A. & E. 112) followed. Crisp *v.* Martin - - - - - 302

PUBLIC WORSHIP ACT, 1874, c. 81 - 316
See Book of Common Prayer.

QUEEN'S PROCTOR—Intervention - - 65
See Intervention.

RES JUDICATA—Foreign judgment - 393
See Foreign Judgment.

RETABLE—Church - - - - 373
See Book of Common Prayer. 3.

REVOCATION OF WILL—*Revocation by Marriage —Revival by a duly executed Codicil—Destruction of Codicil—Probate.*] The testator having duly executed a will, subsequently married. On the day of and after the marriage ceremony he executed a codicil, by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his will. His wife predeceased him, and on his death the codicil, which had been in his possession, could not be found. Declarations of the testator of a desire to adhere to his will were proved extending up to the latest period of his life:—*Held*, that the testator could not have intended by the destruction of the codicil to render his will inoperative, and that the Court would therefore grant probate of the will and of the codicil as contained in a draft from which the original was prepared for execution. James *v.* Shrimpton - - - - - 431

2. —— *Revoked by Marriage — Subsequent Will—Conditional Revival of first—Incorporation.*] The deceased, having duly executed his will, married, and subsequently executed another will in favour of his wife and children. In this last will, in case there were no child or children of the marriage living at the death of his wife, he revived and brought into force again his former will, and directed that its provisions and directions should be complied with as though they formed part of his last will. At the time of his death there were living a widow and one child:—*Held*, that the first will should be included in the probate. In the Goods of Bangham - 429

—— Presumption - - - C. A. 154
See Lost Will.

RULES OF SUPREME COURT, O. II., r. 4 - 300
See Service out of the Jurisdiction. 1.

—— O. XI., r. 1 - - - - 300
See Service out of the Jurisdiction. 1.

—— O. XIII. - - - - - 121
See Writ specially indorsed.

—— O. XVI., rr. 12, 13 - - - 148
See Citation of Heir at Law.

—— O. XXXIX., r. 1 - - C. A. 154
See Lost Will.

—— O. XLIV., r. 2 - - - - 421
See Attachment.

—— O. LIII., rr. 2, 3 - - - 422
See Motion.

—— O. LVIII., rr. 2, 14 - - C. A. 154
See Lost Will.

—— O. LVIII,, r. 15 - - - C. A. 280
See Security for Costs.

SALVAGE—*Agreement — Queen's Ship — Indian Government—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 484.] The commander and crew of a Queen's ship have the same rights to remuneration for salvage as the master and crew of a merchant ship, but—*Quære*, whether they can make with the captain of the wrecked ship an agreement as to the amount.—The commander of a Queen's ship, sent to render help to a wrecked ship, cannot impose terms and refuse to give salvage services unless those terms are accepted. —A ship belonging to the Bombay Government with a hired commander and crew is, with respect to the provisions of the Merchant Shipping Act, 1854, s. 484, in the same position as a Queen's ship with commissioned officers. The Cargo ex Woosung - - - - C. A. 260

2. —— *Inequitable Agreement—Award for Life Salvage.*] An English steamship, bound from Sumatra to Jedda, having on board as passengers 550 pilgrims, was wrecked in the Red Sea. The pilgrims took refuge on a rock where if bad weather had set in they would have been exposed to imminent danger. In answer to signals of distress a steamship belonging to the plaintiffs came up, and her master refused to rescue the pilgrims for a less sum than 4000*l.*, which was the amount of the passage money to be paid to the owners of the wrecked vessel for carrying the pilgrims from Sumatra to Jedda. Ultimately the master of the wrecked vessel signed an agreement to pay 4000*l.* to the master of the plaintiffs' vessel to take the pilgrims to Jedda, and the pilgrims were taken in the plaintiffs' vessel to Jedda in safety. In an action to enforce the agreement:—*Held*, that the agreement must be set aside as inequitable, and the Court awarded 1800*l.* as salvage remuneration. The Medina - - 272

3. —— *Salvage Services rendered in saving the Lives of Passengers in Danger—Right of Life Salvors to arrest Cargo recovered by Divers subsequently to the Services in Respect of which Salvage Remuneration is claimed.*] A German steamship was wrecked in British waters and the lives of ten of her passengers were saved by the crews of a pilot cutter and three gigs. Subsequently divers, employed by the owners of the cargo of the steamship, succeeded in recovering from the wreck a large amount of specie. A cause of salvage was instituted on behalf of the owners

SALVAGE—*continued.*
and masters and crews of the pilot cutter and the gigs against the specie:—*Held*, that the plaintiffs were entitled to be paid salvage remuneration out of the proceeds of the specie. The Cargo ex Schiller - - - - - 473

SECURITY FOR COSTS—*Appeal—Order LVIII., Rule* 15.] The Court of Appeal refused to direct a defendant who had appealed from a judgment of the Admiralty Division, although his ship had been arrested and released on bail, and although he had obtained a stay of execution pending the appeal, to give security for the costs of the appeal. The Victoria - - - - C. A. 280

SERVICE OUT OF THE JURISDICTION—*Practice—Jurisdiction in respect of Damage done by a foreign Ship on the high Seas—Supreme Court of Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *Schedule* 1, *Order II., Rule* 4, *Order XI., Rule* 1.] A ship sailing under a foreign flag, and belonging to a foreign company established abroad, came into collision with, and did damage to, an English ship on the high seas. The owners of the English ship applied for leave to issue a writ of summons, of which notice should be given out of the jurisdiction, claiming compensation for the damage, against the foreign company. Leave refused.—The phrase, "within the jurisdiction," used in the Judicature Act, 1875, sch. 1, Order XI., Rule 1, means territorial jurisdiction. In re Smith 300

2. —— *Testamentary Suit—Defendant out of the Jurisdiction and a Foreigner—Notice of Writ of Summons.*] Where one of the defendants is a foreigner resident abroad the proper course is to take out a concurrent writ of summons, and to serve a notice of it upon such defendant. Beddington *v.* Beddington - - - 426

SETTLEMENT BY DIVORCE COURT—*Dissolution of Marriage — Alteration of Settlements — Covenant to appoint in favour of Respondent—Allowance to Petitioner under a Separation Deed —Delay.*] After a final decree in a suit for dissolution of marriage, the Court has authority under 22 & 23 Vict. c. 61, s. 5, to relieve an innocent party from a covenant to appoint in favour of the other party who has been guilty of a matrimonial offence.—Where a petitioner has accepted an allowance from the respondent under a deed of separation, and subsequently has sufficient grounds to claim a dissolution of his marriage, he is not precluded from applying for an increased provision out of the income of the respondent. Benyon *v.* Benyon - - - - 447

2. —— *Order to vary Settlements after Dissolution of Marriage—Property brought into Settlement by Wife—Omission of dum sola et casta vixerit Clause—Power of Court to review and alter Order for Variation of Settlements—22 & 23 Vict. c.* 61, *s.* 5.] Where a marriage has been dissolved on a wife's petition, and the settlements are varied by extinguishing the husband's interest in property brought into settlement by the wife, the Court will not impose the condition that she shall enjoy such property only dum sola et casta vixerit.—The Court has power to review and alter an order for the variation of marriage settlements, but it will not do so by reason of circumstances which have occurred since the making of the order. Gladstone *v.* Gladstone - - 442

SHIP—Collision—Bond for damages - 292, [C. A. 411
See Bottomry Bond.

—— Collision—Measure of damage - 466
See Damages for Collision.

—— Damage to pier—Foreign law 43, C. A. 107
See Foreign Law. 1.

—— Limitation of liability—Practice - 65
See Limitation of Liability.

—— Necessaries—Jurisdiction - C. A. 253
See Necessaries for Ship.

—— Stores—Probate suit—Injunction - 72
See Injunction.

—— Stern lights—Negligence - C. A. 276
See Evidence of Negligence.

SOLICITOR—Proctor—Arches Court - 312
See Proctor.

STATUTES:

1 Edw. 6, c. 1, s. 8 - - - P. C. 80
See Book of Common Prayer. 2.

38 Geo. 3, c. 87, s. 1 - - - 435
See Executor Abroad.

3 & 4 Vict. c. 65, s. 6 - - C. A. 253
See Necessaries for Ship.

3 & 4 Vict. c. 86 - - - P. C. 80
See Book of Common Prayer. 2.

4 & 5 Vict. c. 76, s. 14 - - - 481
See Perjury.

17 & 18 Vict. c. 104, s. 65 - - - 72
See Injunction.

—— —— s. 370 - - - - 135
See Compulsory Pilotage.

—— —— s. 484 - - - C. A. 260
See Salvage. 1.

20 & 21 Vict. c. 77, ss. 35, 39, 61, 62, 63 [C. A. 154
See Lost Will.

—— —— s. 61 - - - - 148
See Citation of Heir-at-Law.

—— —— s. 73 - - - - 439
See Administration by Creditor.

20 & 21 Vict. c. 85 - - - - 481
See Perjury.

21 & 22 Vict. c. 95, s. 18 - - - 435
See Executor Abroad.

23 & 24 Vict. c. 144, s. 7 - - - 65
See Intervention.

24 Vict. c. 10, s. 10 - 292, C. A. 411
See Bottomry Bond.

24 & 25 Vict. c. 114, s. 2 - - - 438
See Domicil. 2.

24 & 25 Vict. c. 134, s. 137 - - 427
See Administration de bonis non.

31 & 32 Vict. c. 71, s. 27 - - - 52
See County Court Appeal.

32 & 33 Vict. c. 71, s. 111 - - 427
See Administration de bonis non.

33 & 34 Vict. c. 28, s. 19 - - - 137
See Costs in Divorce Suit.

36 & 37 Vict. c. 66, s. 16 - - - 72
See Injunction.

—— —— ss. 19, 22, 49 - - C. A. 154
See Lost Will.

—— —— ss. 34, 42 - - - 52
See County Court Appeal.

STATUTES—*continued.*

36 & 37 Vict. c. 66, s. 87 - - - 302
See Proctor.

37 & 38 Vict. c. 85 - - - - 316
See Book of Common Prayer. 1.

38 & 39 Vict. c. 77, s. 18 - - C. A. 154
See Lost Will.

STAYING PROCEEDINGS—*Stay of Execution on Motion pending Appeal—Inhibition—Public Worship Regulation Act,* 1874, *s.* 9—*Motion.*] Although in every appeal in ecclesiastical cases it has been very much a matter of course and a ministerial act of the officer of the Court to issue an inhibition, yet a discretion rests with the appellate tribunal to issue it or not.—Under the Public Worship Regulation Act, 1874, s. 9, the ecclesiastical judge has power to restrain proceedings under the decree during the whole of the appeal.—In an appeal pending against a decree of the judge of the Arches Court pronouncing unlawful (1.) the wearing of certain vestments; (2.) the use in the Holy Communion of wafer bread or wafers; (3.) the minister standing in a particular position; (4.) the setting up and placing on the top of the screen separating the chancel of the church from the body of the church, and still retaining thereon, a crucifix, the judge refused to suspend the execution of any part of the decree. The Judicial Committee of the Privy Council, although no appeal was given from such order by the Act, nevertheless, on motion made, in the exercise of their discretion, directed that by the inhibition the execution of that portion of the decree which related to the crucifix should be suspended pending the appeal. Ridsdale *v.* Clifton P. C. 383

—— Lis alibi pendens - - - 368
See Lis alibi pendens.

SUBSTITUTED SERVICE—*Restitution of Conjugal Rights—Written Demand for Cohabitation—Respondent keeping out of the Way—Rule* 175.] If the Court is satisfied that the residence of an intended respondent is wilfully kept from the knowledge of the petitioner, it will order substituted service of the demand for cohabitation required by Rule 175 (Additional Rules and Regulations, 30th January, 1869), as well as of the petition and citation. In the Matter of Sheehy - 423

TOMBSTONE — *Inscription on Tombstone in Churchyard—"Reverend"—Wesleyan Minister.*] The daughter of H. K., a Wesleyan minister, was buried in the churchyard of the parish where her father resided. The incumbent of the parish refused to allow a stone with an inscription describing the deceased as daughter of the "Rev^d." H. K., "Wesleyan Minister," to be erected over the grave:—*Held,* that the presence of the words "The Rev^d." before "H. K., Wesleyan Minister," in the inscription, which was otherwise unobjectionable, was not a sufficient justification for the incumbent refusing to allow the tombstone to be erected within the churchyard.—The word "reverend" is not a title of honour or dignity; and a person prefixing the word to his name does not thereby claim to be a person in holy orders. Keet *v.* Smith - - - - P. C. 73

WESLEYAN MINISTER—Tombstone—Inscription - - - - P. C. 73
See Tombstone.

WILL—Execution—Attestation - - 433
See Execution of Will. 2.

—— Execution—Signature - - - 70
See Execution of Will. 1.

—— Executor abroad - - - 435
See Executor Abroad.

—— Lost will—Evidence of contents C. A. 154
See Lost Will.

—— Naturalized Englishman—Domicil - 438
See Domicil. 2.

—— Probate—Foreign will - - 150
See Foreign Will.

—— Revocation—Marriage - - - 431
See Revocation of Will. 1, 2.

WORDS—"Lawful cause" - - P. C. 80
See Book of Common Prayer. 2.

—— "Within the jurisdiction" - - 300
See Service out of the Jurisdiction. 1.

WRIT—Service out of jurisdiction - - 426
See Service out of the Jurisdiction. 1, 2.

—— Service out of the jurisdiction - 300
See Service out of the Jurisdiction. 1.

—— Special indorsement—Action in rem - 121
See Writ specially indorsed.

WRIT SPECIALLY INDORSED—*Practice—Judgment by Default in Admiralty Actions in rem—Judicature Act,* 1875, *Order XIII.—Order of* 1*st December,* 1875.] Proceedings by default in Admiralty actions in rem are regulated by the practice which prevailed in the High Court of Admiralty immediately before the passing of the Judicature Act, 1875. The Polymede - 121

END OF VOL. I.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

BIBL. LONDIN. UNIV.